1992

Brad N. Holbrook v. Master Protection Corporation, dba Firemaster, a California corporation; Robin D. Phillips; and John Does 1-20 : Brief of Appellee

Utah Court of Appeals

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920216

DOCKET NO. ____

IN THE UTAH COURT OF APPEALS

BARD N. HOLBROOK, Plaintiff-Appellee-Cross-Appellant, vs. MASTER PROTECTION CORPORATION dba FIREMASTER, a California corporation; Robin D. Phillips; and John Does 1-20, Defendant-Appellant-Cross-Appellee.	**BRIEF OF APPELLEE** **BRIEF OF CROSS-APPELLANT** Appeal No. 920216-CA (Oral Argument Priority No. 16)

Appeal from a Final Judgment
of the Third Judicial District Court
of Salt Lake City County, Utah.
The Honorable Pat B. Brian

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IN THE UTAH COURT OF APPEALS

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I.

JURISDICTION

The authority believed to confer jurisdiction on the Supreme Court of the State of Utah to hear this appeal from the Third Judicial District Court of Salt Lake County is Article VIII, Section 4 of the Utah Constitution; Utah Code Ann., Section 78-2-2(3)(j) (1988); and Rule 3(a) Utah Rules of Appellate Procedure. The Supreme Court, acting pursuant to Rule 42, Utah Rules of Appellate Procedure, transferred this appeal to this Court by order dated April 3, 1992.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The following issues were presented for review in this case by the appellant:

1. Did the Trial Court abuse its discretion in denying the motion of appellant, Master Protection Corporation, dba Firemaster (hereinafter "Firemaster") to continue the trial.

Firemaster claims this issue is a mixed question of fact and law. The nature and extent of the facts supporting and opposing motion for a continuance of the trial date are reviewable under a clearly erroneous standard. Utah R.Civ.P. 52(a); State v. Humphreys, 707 P.2d 109 (Utah 1985). Whether the Trial Court abused its discretion in refusing to continue the trial date is a question of law reviewed for correctness. Griffiths v. Hammon. 560 P.2d 1375, 1376 (Utah 1977).

2. Did the Trial Court err in refusing to grant Firemaster a new trial where the jury issued verdicts that were inconsistent between Firemaster and Mr. Holbrook? This issue is a question of law reviewed for correctness. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

3. Was substantial evidence presented at trial respecting the nature or extent of, or responsibility for, damages to Mr. Holbrook beyond those for unpaid sales commissions to constitute an abuse of discretion by the Trial Court in refusing to grant Firemaster's motion for a remittitur of the jury's award of $50,000 on Mr. Holbrook's claim for breach of the implied covenant of good faith and fair dealing?

This issue is a mixed question of fact and law. The

factual composition of the disputed damages is reviewable under a clearly erroneous standard. Utah R.Civ. P.52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). The propriety of the Trial Court's refusal to compel a remittitur of the disputed damages is a question of law reviewed for correctness. Marchant, supra at 677.

4. Did the Trial Court err in refusing to award attorneys' fees to Firemaster as the "prevailing party" on the parties' respective breach of contract claims? This is a question of law reviewed for correctness. Marchant, supra 771 P.2d at 677.

5. Did the Trial Court err in refusing to enter judgment against Mr. Holbrook for any portion of three promissory notes that he signed to purchase his franchises?

This issue is a mixed question of fact and law. The extent to which Mr. Holbrook is indebted to Firemaster under the notes is a factual issue reviewable under a clearly erroneous standard. Matter of Estate of Bartell, 776 P.2d at 886. Whether Mr. Holbrook is excused from performing his obligations under the notes is a question of law reviewed for correctness. Marchant, supra 771 P. 2d at 677.

6. Did the Trial Court err in overruling Firemaster's objection to the statement of Mr. Holbrook's counsel in closing argument that he was "... just certain that none of you (jurors) would choose to be placed in that kind of a circumstance (of being forced to enter into promissory notes), and were you, that you would feel as though you had been forced into the decision to go into debt?" This is a question of law reviewed for correctness. Marchant, supra 771 P.2d at 677.

7. Did the Trial Court err in deciding to terminate a

previously entered against Mr. Holbrook, an injunction that enjoined Mr. Holbrook from using any confidential customer information. This is a question of law reviewed for correctness. Marchant, supra 771 P.2d at 677.

B. Statement of issues presented by the cross-appeal of Mr. Holbrook:

1. Did the Trial Court err in refusing to grant the Plaintiff's motion for partial summary judgment requesting that Firemaster should be ordered to perform and pay for a fair and impartial accounting under the contracts? This is a question of law to be reviewed for correctness. Marchant, supra, at 677.

2. Did the Trial Court err in granting Firemaster's Motion to Dismiss the State and Federal Racketeering claims by Mr. Holbrook? This is a question of law reviewed for correctness as a result of the Trial Court's decision to grant Firemaster's Rule 12(b)(6) Motion to Dismiss. Marchant, supra, at 677.

3. Did the Trial Court err in refusing to permit Mr. Holbrook to put on evidence at trial of lost profits incurred as a result of the imposition of the preliminary injunction and/or alternatively to permit such a determination as part of Mr. Holbrook's post-trial Motion for Declaratory Relief?

This is a question of law reviewed for correctness. Marchant, supra, at 677.

4. Was the award of only $5,872.36 in punitive damages error where the District Court refused to permit evidence of Firemaster's net worth to go to the jury?

This is a question of law reviewed for correctness. Marchant, supra, at 677.

5. Did the Trial Court err in not granting Mr. Holbrook's Motion for Directed Verdict, Motion for Judgment NOV, and Motion for Declaratory Relief, striking the jury verdict to Firemaster regarding the breaches of the confidentiality provisions of the contracts? The result of a determination in Mr. Holbrook's favor would be a finding of a wrongful injunction and that Mr. Holbrook was the prevailing party for assessing and awarding costs and attorneys' fees.

This is a mixed question of law and fact. The factual composition of the question is reviewable under a clearly erroneous standard. See Matter of Estate of Bartell, supra. The question of law is Marchant, supra, at 677.

6. Did the Trial Court err in refusing to award Mr. Holbrook his attorneys' fees and costs as the prevailing party in the action under the contracts, based upon the "net winner" concept, or by law.

This is a mixed question of law and fact. The factual composition of the issue is reviewable under a clearly erroneous standard. Matter of Estate of Bartell, supra. The legal composition of the question is to be reviewed for correctness. Marchant, supra.

7. Did the District Court err in requiring Mr. Holbrook to pay the sum of $11,014.00 in cash as an "equitable" payment to Firemaster for access to the confidential customer list after Mr. Holbrook was found to have fully performed his obligations under the contracts until he terminated because of the breaches of Firemaster over the two and one-half year period prior to his termination?

This is a mixed question of law and fact. The factual

[illegible] is reviewable under a clearly erroneous standard. Matter of Estate of Bartell, supra. The legal composition of the question is to be reviewed for correctness. Marchant, supra, at 677.

III.

DETERMINATIVE STATUTES, ORDINANCES OR RULES

There are no constitutional provisions, statutes, ordinances or rules whose interpretation is believed to be solely determinative of the outcome of this case.

IV.

STATEMENT OF THE CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN DISTRICT COURT.

Bard Holbrook, the Plaintiff in this case, instituted this action to recover funds from sales, services, and from overcharges for parts purchases for which he had either not been paid, or for which he had been overcharged pursuant to accounting decisions by Firemaster and for reimbursement for services paid for by him but never rendered in whole or in part by Firemaster under a series of territory and franchise agreements (collectively, the "Franchise Agreements") with Master Protection Corporation, (hereinafter referred to as "Firemaster").

Mr. Holbrook claimed that the underpayments and

overcharges relating to the sums owed him by Firemaster not only constituted breaches of the various agreements but were done in an intentional, consistent pattern which constituted among other claims conversion, breach of fiduciary duty, racketeering, fraud, breach of the implied covenant of good faith and fair dealing in contracts and justified the imposition of punitive damages.

All of the claims of Mr. Holbrook in this action are as a result of Firemaster's actions during the time period of June, 1987 through January of 1990 when Mr. Holbrook was working under the agreements between the parties. In January of 1990, after Mr. Holbrook had terminated his relationship with Firemaster he started his own company in the fire suppression industry in competition with Firemaster.

Firemaster counter-claimed in the lawsuit for alleged breaches of the franchise agreements for actions of Mr. Holbrook after his termination of the agreements in January of 1990. Firemaster introduced absolutely no evidence at Trial to show any breaches of the agreements by Mr. Holbrook prior to his termination of the agreements in January 1990. In fact, Firemaster stipulated it would introduce no such evidence (Tr. at R. 5244-45). The special jury verdicts returned by the jury found Mr. Holbrook to have honored all three agreements and Firemaster to have breached all three agreements.(R. 2729-37, 2759-60).

Shortly after entering the lawsuit, Firemaster requested a preliminary injunction restraining Mr. Holbrook from servicing certain accounts during the pendency of the action which he had serviced while associated with Firemaster. The District Court imposed such preliminary injunction and required a bond only $75,000, well below the $500,000 bond requested by Mr. Holbrook.

Mr. Holbrook made a motion to the Trial Court for a partial summary judgment for an accounting on the grounds that Firemaster had been assigned all sales by Mr. Holbrook under the contracts and by contract was paid to perform bookkeeping and accounting for Mr. Holbrook regarding such accounts receivable. The Court denied this motion.

Firemaster made several motions to dismiss various claims brought by Mr. Holbrook. One motion sought to dismiss Mr. Holbrook's claims against Firemaster under the Utah State and Federal Racketeering Statutes. The Court granted such motion on the basis that the choice of law provisions in the contracts dictated that California law applied. (R. 1671-74) and not Utah or Federal law.

At trial, the jury issued a series of special verdicts, which among other things awarded Mr. Holbrook compensatory damages of $85,935.06.[1] In doing so, the jury specifically determined Mr. Holbrook had fulfilled all his obligations under the contracts and that Firemaster, by its actions, was prohibited from enforcing the contracts against Mr. Holbrook. (R. 2729-37, 2759-60).

As a consequence of the jury being presented with a lengthy number of special verdicts (R. 2719-62), the jury made an apparently contradictory ruling by awarding Firemaster $10,000 in damages on one of its counter-claims for alleged breaches of the confidentiality provisions of agreements (including a trade secret agreement) which the jury found to be still in effect in some manner after Mr. Holbrook's termination with Firemaster in January of 1990. (R. 2726-28).

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[1] The jury also awarded Mr. Holbrook $5,872.36 in punitive damages against Firemaster on his conversion cause of action.

In entering final judgments in the case based upon the jury's verdicts, (R. 3882-91), the Trial Court rejected Mr. Holbrook's claim that Utah law as found by this Court in the cases of Wright v. Westside Nursery, 787 P.2d 508 (Utah App. 1990) and, Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988) clearly mandates that because:

1) Mr. Holbrook was found to have honored his obligations under the contracts between June of 1987 and January of 1990; and

2) only thereafter acted in contravention of such contracts; and

3) that to the contrary Firemaster repeatedly breached all the contracts from June of 1987 through January of 1990;

4) that the Trial Court should have applied the law to this case and declared that all Mr. Holbrook's obligations under all the agreements were terminated and as a matter of law stricken the $10,000 award to Firemaster under its claim for breach of the confidentiality provisions of the contracts.

Both sides submitted multiple post-trial motions to the Trial Court. The failure of the Trial Court to clarify the respective legal positions of the parties' rights and obligations under the contracts and thereafter, based upon the clear chronology of the case, denied Mr. Holbrook being found by the Trial Court to be the prevailing party in the action for purposes of recovering his costs and attorneys' fees.

At Trial, the Court had granted portions of Firemaster's motion in limine by refusing to permit Mr. Holbrook to submit evidence of damages he sustained as a result of the imposition of the injunction to the jury on the basis that he had not properly pled the issue of special damages under Rule 9(g), Utah Rules of

Holbrook damages for the imposition of the injunction as requested by him in his post-trial Motion for Declaratory Relief.

The Trial Court, by granting Firemaster's objection to such evidence at trial, refused to permit the submission of the Firemaster financial statement to the jury, notwithstanding the jury being permitted to consider the issue of the appropriate amount of punitive damages which was submitted by way of a special verdict form. (R. 2743-45). The jury assessed punitive damages against Firemaster as a result of the conversion of his funds by Firemaster. The correct amount of punitive damages could not possibly have been assessed as a result of the jury having no financial information pertaining to Firemaster. An award of punitive damages without financial information pertaining to the Defendant's net worth is clearly a violation of Utah law. See Crookston v. Fire Insurance Exchange, 164 Utah Adv. Rep. 3 (Utah 1991).

In the process of arguing Firemaster's post-trial motion to impose liability on Mr. Holbrook for the promissory notes associated with the franchise purchase, the Trial Court arrived at the result, sua sponte, of awarding Firemaster the sum of $11,014.00 as an "equitable" payment by Mr. Holbrook for access to customer information.

Final judgment was entered on Mr. Holbrook's complaint and Firemaster's counterclaims on October 3, 1991 (R. 3882-91). The Trial Court thereafter denied Mr. Holbrook's Motion for Judgment Notwithstanding the Verdict and Firemaster's Motions for Remittitur, New Trial and for Judgment NOV by Order dated January 3, 1992 (R. 4253-54). Firemaster filed its notice of appeal on

January 27, 1992 (R. 4255). Mr. Holbrook filed his notice of cross-appeal on February 4, 1992 (R. 4262).

B. STATEMENT OF FACTS

Bard N. Holbrook, the Plaintiff, Respondent and Cross-Appellee herein, had been engaged in the business of fire prevention and suppression services in the State of Utah and surrounding areas for approximately seventeen years when this matter was instituted in January of 1990. (Tr. at R. 4342-43).

For the two and one-half year period prior to January of 1990, Mr. Holbrook had been affiliated with a company known as Firemaster, in the capacity of an independent contractor and franchisee.

During this time period of 1987-1990, Mr. Holbrook provided goods and services in large part to those customers he had been servicing for many years prior to his association with Firemaster. (Tr. at R. 4374-75).

Firemaster is a Delaware corporation, having it's principle place of business in Los Angeles, California. Firemaster is the largest company of its kind in the country the fire suppression industry.

Firemaster did not operate any business in the State of Utah prior to approximately June of 1987. In June of 1987, Firemaster bought Intermountain Fire, a fire protection company situated in Salt Lake City. Intermountain Fire was a company that provided fire suppression sales and services throughout the State of Utah. Mr. Robin Phillips was the principal owner of Intermountain Fire and stayed on with Firemaster after the purchase of Intermountain Fire as the Firemaster Branch and District

had been an employee of Intermountain Fire prior to its purchase by Firemaster.

At the time in approximately June of 1987 that Firemaster purchased Intermountain Fire, it terminated the service technicians such as Mr. Holbrook and informed them that they could come to work for Firemaster solely as independent contractors. (Tr. at R. 4349-50, 5061-64). Mr. Holbrook then executed an independent contractor agreement with Firemaster. See Plaintiff's Trial Exhibit 1. (Tr. at R. 4349-50, 4376-78).

In April of 1988, Mr. Holbrook was advised if he did not purchase franchises in the area in which he was servicing customers as an independent contractor that such territories would be sold to someone else and he would be terminated. Faced with losing the territories he had been servicing for years and the prospect of the enforcement against him of the non-competition clauses of the contracts, he entered into Purchase Agreements regarding two franchise areas as set forth in the franchise purchase documents, Plaintiff's Trial Exhibits 2 and 3. (Tr. at R. 4386-4404)

Mr. Holbrook continued to operate in the independent contractor and franchise areas until January of 1990, when he notified Firemaster that he believed he had been underpaid commissions,that he had been overcharged relating to sales and services performed by him under the applicable agreements and that he had not been provided services for which he had paid Firemaster substantial sums of money. Mr. Holbrook made demand upon Firemaster to resolve the problems, but after it refused to do so he terminated his relationship and instituted this litigation. (R. 3-182)

At the time Mr. Holbrook instituted this litigation he

formed a new company called Fire Suppression Services, Inc. and began performing similar services in the same territories as he had performed for the prior 17 years, including those years when he was associated with Firemaster. Firemaster promptly counter-claimed against Mr. Holbrook alleging that he owed various sums under the franchise agreements, including promissory notes for the purchase of the franchise areas and additionally made claims for breaches of the franchise agreements.(R. 225-545).

At Trial, as set forth in the special verdict forms (R. 2729-37, 2759-60), the jury found that Mr. Holbrook had fully performed his obligations under each of the contracts between the parties. Additionally the special jury verdicts reflected findings in favor of Mr. Holbrook for Firemaster's breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, conversion, and punitive damages associated with such conversion. (R. 2719-62)

The jury awarded damages to Firemaster against Mr. Holbrook for breach of the confidentiality provisions of the contracts (on one or all of the agreements set forth on the special verdict, R. 2726-28) and for sums relating to parts that Firemaster alleged had not been paid for or returned at the time of Mr. Holbrook's termination. Mr. Arthur Miller, Mr. Holbrook's expert accountant, included such sums referenced in the conversion claim in his report, (Plaintiff's Trial Exhibit 32) but the jury chose to ignore such evidence. That award is not the subject of any appeal.

Of particular importance in this case are the factual findings by the jury on the first three special verdict forms relating to each of the three agreements of the parties, which all

Question No. 2: Do you find that the Plaintiff Bard Holbrook fully performed his obligations under the territory agreement [and franchise agreement] prior to it's termination?

Answer: Yes, or No.

Answer: Yes.

Question No. 3: Do you find the Plaintiff Bard Holbrook was lawfully excused from performing any further obligations under the territory agreement?

Answer Yes, or No.

Answer: Yes.

Question No. 4: Do you find the Defendant Firemaster wrongfully and without excuse or justification failed to pay Plaintiff Bard Holbrook the commissions and provide services set forth in Section 4 and 8 of the territory agreement?

Answer: Yes, or No.

Answer: Yes. (R. 2729-2737)

It is crucial to focus on the time period covered by the agreements and the answers of the jury set forth above, i.e. June of 1987 through the end of Mr. Holbrook's association with Firemaster in January of 1990. The jury award to Firemaster of $10,000 for Mr. Holbrook's alleged breaches of the confidentially provisions of the contracts occurred only **after** Mr. Holbrook's termination of his association with Firemaster.

The chronologies in this case must be followed clearly in order to understand both the validity of Mr. Holbrook's appeals and the invalidity of Firemaster's appeals. Both parties reserved certain issues to be presented to the Court for declaratory relief after Trial. Mr. Holbrook made certain motions to the Court for

such motions for declaratory relief by denying Mr. Holbrook's request for attorneys' fees and for special damages to impose liability on the injunction bond. (Tr. at R. 4844-46). The Court, however, did specifically, independent of the jury, rule that Mr. Holbrook had no further obligations under the contracts except to pay a sum, described by the Court as an "equitable" payment for access to the names on the customer list that Mr. Holbrook had been working with while associated with Firemaster. (Tr. at R. 4844-46, R. 3728-29)

Pursuant to Section 8 of each of the contracts between the parties, (R. 42-46, 92-95, 148-151) Firemaster was paid a substantial portion of the proceeds from each sale (generally from 25% to 57% of each transaction) to perform certain general services defined by Firemaster to include bookkeeping and accounting services. In pre-trial proceedings Mr. Holbrook requested by way of a motion for partial summary judgment for an accounting, that because of his payments to Firemaster under the contracts for services in Section 8 of the contracts, that Firemaster should be required to perform an independent accounting and pay for the expenses thereof in order to clearly establish the amounts owed Mr. Holbrook under contracts between the parties (R. 974-991, 1060-1297, 1408-13, 1419-35, 1436-57). The Court denied such motion. (R. 1621-24). Thereafter, Mr. Holbrook was required to hire and pay his own independent accountant to determine such information. The cost of such work was set forth in Mr. Holbrook's motion for costs and attorney's fees filed after trial. (R. 3343-49). Mr. Holbrook has never been reimbursed these amounts.

Mr. Holbrook made claims that Firemaster's actions in

underpaying commission and overcharging for deductions from such commissions were done in an intentional pattern of racketeering. (R. 1332-65). Firemaster brought multiple motions to dismiss those racketeering claims which were responded to by memoranda in opposition and multiple amended complaints. (R. 198-221, 667-701, 713-737A, 811-841, 1332-69, 1458-81, 1529-91, 1606-17, 1618-20, 1626-38, 1671-74). At the final hearing on this issue, the Court dismissed the Federal and Utah State Racketeering claims of Mr. Holbrook based upon it's stated decision that California law applied to the conduct between the parties and whereas no California racketeering claim had been made, the Court dismissed all racketeering charges. (Tr. at R. 5158-68, 5174-91).

Firemaster brought various motions in limine the day before trial, one of which was specifically aimed at limiting Mr. Holbrook's right to bring the issue of lost profits to the jury's attention.(R. 3034-45, 3137-42). Mr. Holbrook's Second Amended Complaint alleges at paragraph 139 (R. 1369) that he was damaged as a result of a wrongful injunction being entered. The Court nevertheless ruled that Mr. Holbrook could not put on evidence of such lost profits because Mr. Holbrook specifically did not say the words lost profits or plead the same appropriately in his complaint according to the Court. (Tr. at R. 5005-10, 5532-33). The Court additionally denied Mr. Holbrook relief for such lost profits on this issue in his post-trial request for such relief. (Tr. at R. 4808-13, 4825)

The Court permitted the issue of punitive damages to go the jury.(R. 2743-45). Mr. Holbrook's counsel requested that Firemaster's financial statement be introduced into evidence, but the Court sustained the objection of Firemaster to such evidence

and did not permit introduction of the financial condition of Firemaster as evidence for the jury to consider. (Tr. at R. 5442-43). In post-trial proceedings the Court indicated that all parties had responsibility in the failure to appropriately submit the issue of punitive damages under Utah law to the jury, including Plaintiff's counsel, Defense counsel and the Court. (Tr. at R. 5795-5803). Under any circumstance, the correct amount of punitive damages could not properly be assessed under Utah Law where evidence of the substantial net worth of Firemaster was not admitted into evidence. See Crookston, supra.

The Plaintiff made a Motion for Directed Verdict and for Judgment Notwithstanding the Verdict based upon the evidence and supported by the jury's specific findings that Mr. Holbrook had fully performed his obligations under the contracts during the time period they were in force, from June of 1987 through January of 1990, and that thereafter by law he had no further obligations to perform under such contracts. (Tr. at R. 5441-2, R. 3903-12). Such Motions for Directed Verdict and Judgment Notwithstanding the Verdict were based upon the Utah Court of Appeal's rational in the cases of Wright, supra and Kinsman, supra. The Trial Court had clearly made the decision, independent of the jury, that the prior breaches by Firemaster negated any ability of Firemaster to enforce the terms of the territory and franchise agreements against Mr. Holbrook. (Tr. at R. 4844-46).

Upon the Court's own motion and without any apparent motion by the parties, the Court fashioned what it termed an "equitable" remedy in requiring Mr. Holbrook to pay the sum of $11,014.00 in cash for access to the confidential customer list. (Tr. at R. 4836-4847, R. 3728-29).

The Court further denied Mr. Holbrook's request for his costs and attorneys' fees by making the statement that it appeared to the Court there was no prevailing party to the Court. (Tr. at R. 4830, 4844-46).

Firemaster brought various post-trial motions including a motion for new trial and request for remittitur which the Trial Court denied. Those claims are in part what make up Firemaster's appeal. The remainder of Firemaster's claims in it's appeal are claimed abuses of the Court's discretion.

The jury and Judge Brian independently found that Mr. Holbrook had lived up to obligations for two and one-half years. Relief was awarded him for his faithful performance under the contracts. Firemaster did obtain some apparently contradictory relief as a result of the multiple special jury verdicts being submitted to the jury, which verdicts contain potential legal contradictions but no factual contradiction by virtue of the chronology of events. Such is the nature of multiple special verdict cases. The Trial Court could and should have rectified any inconsistencies based upon sound legal principles. It is the duty of the jury to find facts and the Court to apply the law. Brigham v. Moon Lake Elec. Assn., 470 P.2d 393 (Utah 1970).

Mr. Holbrook introduced as Exhibits at trial the thousands of transactional accounting records that were generated during his association with Firemaster to substantiate his claims. (Tr. Exhibits 101-4182). Mr. Holbrook and his expert accountant were the only ones who testified they had reviewed all such records. Firemaster at all times had such records and in fact obtained all such documents from Firemaster (R. 974-991, 1224-81, 1621-24).

The problems in such records were testified to by Mr. Holbrook. (Tr. at R. 4416-70) and by his expert accountant, Mr. Arthur Miller (Tr. at R. 4768-80A, 5258-81, 5585-98).

All the relevant facts in this case are those pertaining to Firemaster's conduct from June of 1987 through January of 1990. What happened after that time between these parties as a matter of law should be easily resolvable, i.e. no contracts existed and the parties had no further obligations by law under any contracts, with logical legal and factual consequences to follow.

V.

SUMMARY OF FIREMASTER'S ARGUMENTS ON APPEAL

A. Firemaster claims it was damaged by the Trial Court's abuse of discretion in not granting a continuance of the Trial. This is much ado over nothing. Counsel for Firemaster twice specifically accepted the Court's motion of a brief continuance to prepare for cross-examination of Mr. Holbrook's expert accountant rather than continue to try for any other or further continuance. (Tr. at R. 5243-44, 5280-81). As stated by counsel for Firemaster, he believed that the trial was going well for his client and he did not desire to postpone the conclusion of the Trial because of his belief that he would prevail based upon the proceedings to that point in time.

The Court had previously granted Firemaster a continuance (R. 2627). The Court entered appropriate orders to protect against surprise. (Tr. at R. 4269-96). The documents Firemaster complained of, the so-called "A" documents, were never introduced as exhibits. These exhibits were the sole reason Firemaster

motion for a continuance and therefore no prejudice occurred to Firemaster.

Firemaster had adequate opportunity to perform its own independent accounting on all records because they were in Firemaster's possession, for the years 1987 through 1990. Mr. Holbrook paid Firemaster approximately $158,000 over that time period to perform accounting and bookkeeping services for him.(Tr. at R. 4521, Plaintiff's Trial Exhibits 11 and 34).

No abuse of discretion could have occurred where Firemaster twice stipulated to accept the Court's solution of a brief continuance, rather than pursuing it's motion, thinking it was winning the trial. Now that Firemaster lost, it can only be in bad faith or frivolous that it attempts to have an extra crack at the evidence through this appeal issue.

B. The Court should find that the $10,000 award to Firemaster for it's special verdict regarding it's claim for breach of the confidentiality provisions of the written agreements should be vacated under the this Court's ruling in Wright, supra, and Kinsman, supra, based upon the premise that Firemaster's prior breaches of all three contracts, and Mr. Holbrook's fulfillment of his obligations under all three contracts, constituted legal justification for Mr. Holbrook's termination of the agreements and for excusing Mr. Holbrook from further performance under them. Such a decision would eliminate Firemaster's appellate claim, of inconsistent verdicts necessitating a new trial and any problems associated with such verdict. It is the duty of the Court to apply law to the special verdicts, Brigham, supra.

C. The evidence amply supports the Court's entry of judgment of $50,000 to Mr. Holbrook's on his claim for breach of

the implied covenant of good faith and fair dealing. Mr. Holbrook and his accountant testified to actual damages of $207,546.34. (Tr. at R. 4251, Trial Exhibits 11 and 34). Firemaster failed to marshall the evidence to show how or if this particular jury verdict was in error or that there was a lack of substantial, non-speculative evidence regarding such damage award. Therefore, Firemaster failed in meeting its burden on appeal and this Court should not give the appeal on this issue any consideration. See Mountain States Broadcasting, infra.

D. Firemaster's request for it's attorneys' fees has the correct situations reversed. Once this Court answers the threshold legal question of Mr. Holbrook's obligations after his termination of the contracts in January of 1990, it can and should find Mr. Holbrook was the prevailing party under the contracts for the purpose of assessing costs and attorneys' fees. This Court can and should also base such decision as well upon the "net award" concept, as a result of all of the damages awarded Mr. Holbrook arising out of conduct relating to performance under the contracts during the relevant two and one-half year period between the parties. See Mountain States Broadcasting v. Neale, 776 P.2d 643 (Utah App. 1989). Mr. Holbrook should also be the party awarded his costs and attorneys' fees in the case by law. See Utah Code Annotated 78-27-56.

E. To award Firemaster damages on the notes as requested by Firemaster under the agreements would be a ludicrous result where the Trial Court and the jury independently corroborated each other's decisions in finding that Mr. Holbrook had no further duties under the contracts between the parties. Additionally, Firemaster has possession of the territories those notes were to

purchase and this issue is moot. The notes represent the full purchase price of the territories with the ability by Firemaster to award all the rights of a Firemaster franchisee, which rights Firemaster will not transfer to Mr. Holbrook and which association he does not want. The notes are not collectible by virtue of Firemaster's prior preaches of the contracts and because the territories, which the notes pay for, are in Firemaster's possession.

F. The use of Mr. Holbrook's counsel's emotional appeal in closing argument, specifically any alleged "golden rule", is not supported by specific Utah Law, but generally is an issue of argument for the Court to consider. The statement alleged to violate this concept by Firemaster could hardly be substantial enough to generate passion or prejudice to cause the jury to render a decision based upon such passion on prejudice.

The very issue addressed by the alleged error was made in support of Mr. Holbrook's claim that he was forced to enter into the franchise agreements under duress. (Tr. at R. 5477-78). The jury specifically denied Mr. Holbrook relief on this claim (R. 2759). Therefore in fact, Firemaster prevailed on the issue and no prejudice has occurred to it from any alleged error.

G. Firemaster is not entitled to any further equitable relief in the form of an injunction once it had been found to have violated the terms of it's own contracts over a two and one-half year period. To extend equitable and contractual rights to Firemaster after it had been found to have breached it's contracts, to have breached its fiduciary duty to Mr. Holbrook, to have acted in bad faith towards its performance under the contracts, to have intentionally converted the commissions of Mr. Holbrook in a manner

justifying the position of punitive damages after Mr. Holbrook fully performed his obligations under the contracts would destroy every conceivable viable basis for awarding equitable relief. The Court also does not have the right to re-write the parties contracts. See the case of Cunningham v. Cunningham, 690 P.2d 549 (Utah 1984). The request for a continued injunction is both moot and not capable of being substantiated. In fact this Court should make a finding that the preliminary injunction was wrongful which will support Mr. Holbrook's appeals for affirmative relief set forth hereafter.

VI.

SUMMARY OF MR. HOLBROOK'S ARGUMENTS ON APPEAL

A. The Trial Court's failure to grant Mr. Holbrook's Motion for Partial Summary Judgment to require Firemaster to perform a fair and impartial accounting under the contracts was error in that there was no genuine question as to any material fact relative to Firemaster being paid approximately $158,000 under the contracts for general services which, among other services, included bookkeeping and accounting services. (See Plaintiff's Trial Exhibits 11 and 34). This was never rebutted at trial. Firemaster was assigned the receivables from all sales and service performed by Mr. Holbrook (as an example see Trial Exhibit 114), by the invoices used by the parties at all relevant times, which state in pertinent part as follows:

> "Seller hereby assigns this Account Receivable to Master Protection including all taxes"

Firemaster therefore had an obligation to account for and disburse such funds from these receivables to Mr. Holbrook under the contracts as well as under a fiduciary duty associated with the handling of such funds implied at law. (R. 42-46, 92-95, 148-151). By virtue of the Trial Court's denial of his motion, Mr. Holbrook was required to hire and pay his own accounting expert. Based on the jury's and Court's findings, Firemaster should now be ordered to pay all such costs.

B. The Trial Court's decision to dismiss Mr. Holbrook's Utah State and Federal racketeering claims for relief on the basis of a choice of law provision in the contracts rather than based upon tort choice of law precedent, was clear reversible error. Tort law, rather than contract law should have been applied to the choice of law decision. If the Trial Court had done so, it would have found Utah law applied and denied the motion to dismiss. Such a decision requires a remand of such claims for further proceedings. The award of attorneys' fees to Firemaster as a result of such dismissal should also be vacated.

C. The Trial Court's refusal at trial to permit the Plaintiff to put on evidence of lost profits relating to the wrongful imposition of an injunction, when that specific language had been included in the Plaintiff's Second Amended Complaint, (R. 1369), and where Firemaster had requested the injunction, been required to post a $75,000 bond if such injunction was found to be wrongful, and where the Court had ample evidence to support an award of the full bond to Mr. Holbrook was clear reversible error on the part of the Court. Mr. Holbrook should be awarded the $75,000 injunction bond since Firemaster already requested such bond amount based on its representation that $75,000 was Mr.

be permitted to request such damages from a new jury or the Court.

D. The award to Mr. Holbrook of only $5,872.36 in punitive damages on his conversion cause of action was clear reversible error where the District Court refused to permit evidence of Firemaster's substantial net worth to go the jury. This clearly violates the criteria relating to punitive damages under Utah law. See Crookston, supra. In post-trial proceedings, the Court acknowledged there was error in the manner this issue was handled on the part of Plaintiff's Counsel, the Court and Defense counsel. (Tr. at R. 5796-99) and that the issue should be corrected. The correct result is to permit a new trial solely as to what is the correct amount of punitive damages to be charged against Firemaster. See the Utah case of Bundy v. Century Equipment Co., 692 P.2d 754 (Utah 1984).

E. The Trial Court erred in refusing to grant Plaintiff's Motion for Directed Verdict and Judgment Notwithstanding the Verdict, or Mr. Holbrook's Motion for Declaratory Relief on the issue that Mr. Holbrook should be relieved of any and all further obligations under the contracts after his termination in January of 1990, including the $10,000 award to Firemaster. The Utah cases of Wright, supra, Kinsman, supra and Cunningham, supra all dictate such a result and to find otherwise was clear, reversible error by the Court.

F. The Trial Court erred in refusing to award Mr. Holbrook his costs and attorneys fees as the prevailing party under the contracts. (See Plaintiff's Trial Exhibits, 1 pgs. 21 and 22, Exhibit 2, pgs. 22-23, and Exhibit 3, pgs. 22-23).

The Trial Court also failed to award Mr. Holbrook his

Mountain States Broadcasting, supra.

The Trial Court also should have awarded Mr. Holbrook his costs and attorneys fees under the provisions of Utah Code Annotated 78-27-56, where Firemaster was found to have breached its fiduciary duty to Mr. Holbrook, to have breached the implied covenant of good faith and fair dealings in contracts, and tortiously converted Mr. Holbrook's funds in a manner justifying the imposition of punitive damages.

If Utah Code Annotated 78-27-56 has any validity under Utah law, it is an abuse of discretion to not apply it against Firemaster in this case.

G. The District Court erred in requiring Mr. Holbrook to pay the sum $11,014. in cash, as an "equitable" payment to Firemaster for access to the confidential customer list. The Court cannot re-write the parties' contract by the use of equitable relief. See Cunningham, supra. Firemaster was not entitled to equitable relief from any Court by virtue of it's own willful and intentional tortious conduct toward Mr. Holbrook.

VII.

REPLY TO FIREMASTER'S ARGUMENTS

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO CONTINUE TRIAL OF THE CASE.

Firemaster claimed that Mr. Holbrook's prejudicial failure to timely provide information allegedly vital to Firemaster's defenses should have caused the Court to grant it's motion for continuance of the Trial.

A very simple resolution exists of this issue. Counsel for Firemaster, because he believed his client was winning at trial and did not want to lose his momentum, twice waived the motion for a continuance by Stipulation, (Tr. at R. 5237-44, 5280-81). Therefore no error can be ascribed. Firemaster's Stipulation at trial clearly shows that this issue is meritless and should be summarily dismissed.

The standard Firemaster must otherwise meet in claiming error is that the Trial Court abused it's discretion in failing to grant the continuance requested. State v. Humphreys 707 P.2nd 109 (Utah 1985).

The record is clear that in this case the original accounting records were all in the possession of Firemaster. (R. 42-46, 92-95, 148-151). Firemaster was paid approximately $158,000 to maintain such records, perform bookkeeping services relating to and account for such funds. (Plaintiff's Trial Exhibits 11, 34 and see Section 8 of each of Plaintiff's Exhibits 1, 2 and 3). Firemaster at all times was on notice and understood these records to be the critical exhibits for trial. See Defendant's Response to Plaintiff's Requests for Production of Documents. (R. 657-662, 858-866).

Mr. Holbrook made a motion to the Court that Firemaster be required to perform an independent accounting on the funds it had received and was responsible for under the contracts. (R. 974-991). The Court denied such motion but required Firemaster to provide access to those records when it had failed under previous document requests to adequately provide copies of the thousands of pages of records required in this case. (R. 1621-24).

Firemaster took Mr. Holbrook's deposition on at least two

at those times but choose not to do so. (R. 546-48, 1653-54).

The Court ordered of the parties that any documents not timely produced prior to trial would be inadmissable at trial. (R. 4285-86). The documents complained about by Firemaster, the "A" documents, were not introduced as exhibits at trial and are not part of the record. In fact, Mr. Holbrook sought to have such documents suppressed under attorney-work product and other similar rules. (Tr. at R. 2629-41).

No prejudicial error has occurred to Firemaster from the alleged failure to obtain the "A" documents complained about, since:

1) Such documents were not introduced as exhibits at trial and are not a part of the record;

2) Firemaster had an opportunity in pre-trial depositions to ask Mr. Holbrook and Mr. Miller the questions which were in essence what made up the "A" documents Firemaster is complaining about;

3) Firemaster had all of the actual accounting records upon which Mr. Holbrook's and Mr. Miller's testimony were based, for years prior to trial;

4) Firemaster chose not to do it's own independent accounting;

5) Firemaster received one continuance prior to trial to prepare for an additional approximate one month;

6) Firemaster twice accepted a second limited continuance by stipulation during the Trial to have an opportunity to further prepare for the cross-examination of Mr. Miller, rather than seek a longer continuance, in order to press it's perceived advantage;

7) Firemaster did cross examine Mr. Miller, and

8) Firemaster did have it's own expert review the documents in question and he provided detailed testimony attempting to counter the findings of Mr. Miller.

Clearly no prejudice has occurred to Firemaster in terms of their ability to understand and critic the testimony of Mr. Holbrook and Mr. Miller. Firemaster had the transactional documents at all relevant times and it stipulated during trial to proceed based upon its perceived advantage. Firemaster took as its trial approach the same approach it had toward the accounting records it was paid $158,000 by Mr. Holbrook to account for, i.e., let's wait and see if we get caught! Now it has been caught by the jury, it wants to go back for a second chance to make things sound not so bad. The only abuse of discretion on this issue would be to support Firemaster's thinking in this regard. The Trial Court's refusal to grant any other continuance as argued by Firemaster was not an abuse of discretion under the standard of Humphreys, supra and is not reversible error specifically because Firemaster waived this claim.

B. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT FIREMASTER A NEW TRIAL

The premise to begin with in considering this issue is that there is a strong presumption in favor of a jury verdict. See Batty v. Mitchell, 575 P.2d 1040 (Utah 1978); Weber Basin Water Conservancy Dist. v. Skeen, 328 P.2d 730 (Utah 1958); Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, Inc., 713 P.2d 55 (Utah 1986).

The case which is directly on point and should be controlling

regarding this particular argument of Firemaster is this Court's decision in the case of Wright v. Westside Nursery (787 P.2d 508, Utah App. 1990). In the Wright case, this Court has already ruled on a similar fact situation where an employment agreement existed to employ the selling owner of a business as an employee for a particular period of time after the sale of the business to the new owner. The selling owner converted funds while so employed and was terminated, appropriately according to the jury, for conversion of funds belonging to the new owner. The terminated employee counter-sued for breach of his employment agreement because of his termination and the jury found for him as well. The Trial Court in the Wright, supra case, faced the factually contradictory jury verdicts and made the prudent decision on the law, that the prior breaches of the employment agreement justified the termination of the employee, thus prohibiting the employee from relying upon the employment agreement for relief. The Court then set aside the award to the employee for wrongful termination.

The Court in the Wright, supra case, at page 517 indicated that:

> "Thus we hold that the Court appropriately dismissed the wrongful termination claim since Wright had good cause, as a matter of law, to terminate Humphreys."

At page 516 the Court stated:

> "It is a basic tenet of agency law that [a] principal is privileged to discharge before the time fixed by the contract of employment an agent who has committed such a violation of duty that his conduct constitutes a material breach of contract."

Such a ruling should also apply to the principal agent (Franchisor/Franchisee) relationship in the extent case.

In the case of Brigham v. Moon Lake Electrical Assn, 470 P.2d 393 (Utah 1970) the Supreme Court considered the situation of

special verdicts that found the Plaintiff to have suffered damages and also be contributorily negligent. The Court held the special verdicts were not inconsistent and thereby void, since in special verdicts, the jury finds the facts and the court applies the law. That is what the Trial Court should have done in this instance, applied the law of Wright, supra and Kinsman, supra.

In the Utah case of Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078 (Utah 1985), the Court indicated that if a party claims a verdict to be inconsistent it should object prior to dismissal of the jury, or it will be barred from raising the issue on appeal. Firemaster made no objection while the jury was present and should therefore be barred by its failure to object.

In this case, the jury verdicts clearly found that during the critical time period of June, 1987 through January, 1990, Mr. Holbrook fulfilled all his obligations under all the contracts. (R. 2729-37). Similarly, the jury unanimously found that during the time period of June, 1987, through January, 1990, Firemaster breached all three contracts, tortiously converted funds belonging to Mr. Holbrook, breached their fiduciary duty to Mr. Holbrook, and breached their implied duty of good faith and fair dealing relating to those contracts to Mr. Holbrook. The Jury also found the acts of conversion by Firemaster justified the imposition of punitive damages against it. (R. 2743-45). Mr. Holbrook therefore had good cause, as a matter of law, for not continuing to honor any obligations under the contracts as of January, 1990, and thereafter.

Question No. 4 in the special verdict form in favor of Firemaster (R. 2726-28) does not ask the specific question, did Mr. Holbrook breach the agreements referenced in the jury verdict?

provides the jury an opportunity to perhaps decide, that if Mr. Holbrook utilized the customer list in violation of the trade secret agreement, which was an exhibit at trial (Defendant's Trial Exhibit V), that is the basis for the jury's decision. Whether the special verdict form was misleading, or provided the jury the opportunity to make a decision independent, but not necessarily contradictory to, other findings of the jury, is a question not answered by the special verdicts and a question for the Court.

Under any circumstance, based on the Wright, supra reasoning, and the duty of the Court to apply the law as set forth in Brigham, supra, the multiple, intentional and repeated prior breaches of all the agreements by Firemaster over a two and one-half year period constitute legal justification for Mr. Holbrook to refuse to continue to perform his obligations under the contracts. The law of performance under contracts would be totally nonsensical if one party could intentionally and willfully breach the contract, could maliciously convert the funds of the other party to a contract, be caught, not resolve the problem and then still be able to require the injured party to perform under those very contracts that the converting and breaching party has treated with disdain. As stated in this Court's decision in the Kinsman, supra, case at page 213 "such a result will not be tolerated." See also Wright, supra and Cunningham, supra.

This Court therefore should deal with Firemaster's request for a new trial by vacating the $10,000 award to Firemaster by answering the threshold legal question of how an innocent party to a breached contract should conduct himself or herself once the other party to such contract has breached the agreement. The

answer should be that no obligation exists to perform once the contract has been breached by the other side. Based on this answer, Firemaster is not entitled to a new trial as requested.

C. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR $50,000 ON THE FRANCHISEE'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND IN NOT REQUIRING A REMITTITUR OF THAT AWARD AS A CONDITION TO NOT GRANTING A NEW TRIAL.

1. The $50,000 Damage Award Is Supported By the Type of "Substantial Evidence" Required by Utah Law

Regarding this particular claim, the appellant fails in its primary obligation to marshall the evidence as set forth in the cases of Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 713 P.2d 55 (Utah 1986); State v. Larsen, 180 Utah Adv. Rep. 13 (Utah Ct. App. 1992); Zions v. Overthrust Oil & Gas Corp., 179 Utah Adv. Rep 10 (Utah 1992), and Mountain States Broadcasting, supra. On the basis alone, these appellate claims are doomed.

In the case of appeals of jury verdicts, in order to overturn such a verdict, the appellant must marshall the evidence in favor of the verdict and show, notwithstanding such marshalling of the evidence that the decision of the jury was unsupported by "substantial evidence". The act of arguing only selected evidence favorable to their position as Firemaster did on pages 30-35 of its brief, dooms the challenge of Firemaster and is cause for dismissal. See State v. Larsen, supra at 15.

Notwithstanding Firemaster's failure to marshall the evidence, substantial evidence did exist for the finding by the jury that Firemaster had breached its implied covenant of good faith and fair dealing in a manner and in an amount well in excess of $50,000.

In marshalling the evidence, Firemaster should have referenced this Court to and argued why at least the evidence set forth below was allegedly not substantial enough for purposes of meeting the standard to support a jury verdict:

1. Firemaster could not make up it's mind whether Mr. Holbrook continued to work under his independent contractor agreement or some other agreement after he entered into the franchise agreements on April 11, 1988. Firemaster clearly wanted Mr. Holbrook to be bound by the confidentiality provisions of the contracts which benefited Firemaster. On the other hand, Firemaster did not want to be bound by the commission provisions of such agreement and provided totally contradictory evidence among its own representatives on this issue. (Tr. at R. 4381, 4382-83, 4736, 4737-41, 5714-16, 5716a-5719, Testimony of Bob Wiles, 5661-64). Thus, Firemaster in fact treated the issues in such independent contractor agreement that protected them as at all times in effect, but the provisions in such contract that benefitted Mr. Holbrook as terminated. This specifically evidenced itself when Firemaster sought to unilaterally reduce Mr. Holbrook's travel allowance commission in this area from 25% to 15% (Tr. at R. 4430-32, 4452-53, 4462-63). This type of action on the part of Firemaster occurred repeatedly.

2. Mr. Holbrook was informed that the purchase price of his franchise areas was based upon a dollar for dollar formula that meant for every dollar of sales generated in that particular area he would be charged $1 for the purchase price, yet he was never provided evidence of the dollar sales to substantiate this amount as he requested. (Tr. at R. 4393-94, 4402-02a).

3. The documents Firemaster claims to be confidential

were the actual invoices generated from each sale or service. (As an example see Plaintiff's Trial Exhibit 114). In order to correctly account for sales and services and identify the correct commission and charges, the invoices on those sales would be required to be reviewed in order to perform such accounting function. However, Firemaster refused to provide those invoices to their independent contractors and franchisees such as Mr. Holbrook. (Tr. at R. 4401-12, 4595), or to let them retain a copy. The IC's (independent contractors) and FO's (franchise owners) were totally at the mercy of Firemaster to account properly, and paid Firemaster a large sum for such "privilege" (R. 42-46, 92-95, 148-151, Plaintiff's Trial Exhibits 11 and 34).

4. Mr. Holbrook testified to multiple problems relating to sales and service commissions that were due him. (Tr. at R. 4416-70). Firemaster never refuted such claims by any evidence.

5. Robin Phillips, at all relevant times the principal agent for Firemaster, threatened to reduce Mr. Holbrook's commissions after the one year grace period in the contracts expired and stated that he could receive no more work, notwithstanding he had "purchased" such franchise areas, until he executed the schedule reducing his commissions. However, Robin Phillips refused to counter-sign the document on behalf of Firemaster because he said he didn't need to. See Trial Exhibits 8, 9, and 10. (Tr. at R. 4517-20, 4756-57).

6. Shaani Leary testified and corroborated Mr. Holbrook's testimony that he had been promised by Ron Bogardus, the Firemaster representative who sold the franchises to him, that Mr. Holbrook's commissions would stay the same by purchasing the franchise areas as under his independent contractor agreement.(Tr.

7. Shaani Leary testified that she believed Firemaster's treatment of Bard Holbrook was unfair. (Tr. at R. 4668).

8. Robin Phillips testified that all proceeds for all sales and services from all ICs and FOs went directly to Firemaster. (Tr. at R. 4693-95). Robin Phillips testified that it was not the Firemaster policy to give back corrections on sales summaries to the contractors and franchisees so they could review them for accuracy. (Tr. at R. 4700-01). Mr. Phillips testified that one must look at the invoices to see if the correct amount of commission is paid (Tr. at R. 4701-03), yet Firemaster claimed the invoices were confidential and refused to permit the ICs and FOs such as Mr. Holbrook to retain the invoices (Tr. at R. 4703). Therefore no procedure existed for Mr. Holbrook to verify the accuracy of the bookkeeping and accounting that he paid Firemaster to perform on his behalf; and trust only got him deeper in the hole.

9. Firemaster had Mr. Holbrook perform services and paid commissions under a formula calculation which permitted them to earn a profit from sales taxes charged for the job. (Tr. at R. 4710). Mr. Phillips referred to this profit as a "handling fee" (Tr. at R. 4710-11).

10. Robin Phillips, the principal local manager at all relevant times of the Firemaster office for the State of Utah, testified in his deposition in 1990, <u>after</u> this litigation had been filed that at that time he still did not know why Firemaster received it's percentage from each of the invoices sold and serviced by Mr. Holbrook (Tr. at R. 4715-16). This lack of knowledge indicates he did not know why Mr. Holbrook paid

Firemaster $158,000. How could Firemaster, under Mr. Phillips direction, then provide the services it contracted for but did not know it had an obligation to do?

11. Mr. Phillips testified as to problems relating to pricing of parts (Tr. at R. 4717-22). Mr. Phillips also testified pursuant to Trial Exhibit 13, as to what the basis was for Firemaster charging a "extra materials charge" (Tr. at R. 4723-28 and Plaintiff's Trial Exhibit 13). Such computation is not contained in the contracts, was not agreed to by Mr. Holbrook and clearly shows bad faith. It is also contradicted by Mr. Bob Wiles of Firemaster, the general manager of the entire company in Plaintiff's Trial Exhibit 14.

12. Mr. Phillips verified that even though Firemaster was paid to perform accounting and bookkeeping services, they did not make any effort to verify the price of parts on invoices and thus charged Mr. Holbrook the highest price available. (Tr. at R. 4732-36).

13. Mr. Phillips admitted there were problems in keeping track of lead sheets and paying the appropriate commissions to Mr. Holbrook for such leads, notwithstanding the fact that Firemaster was paid substantial sums of money to do so. (Tr. at R. 4742-44).

14. Mr. Phillips admitted Firemaster had no bookkeeping procedure to keep track of commissions to be paid to Mr. Holbrook for second annual inspections which were due him, and for which Firemaster was paid to account. (Tr. at R. 4745-4746).

15. Firemaster admitted that it was receiving a substantial proportion of each invoice to provide advertising services for it's franchisees and independent contractors, on sales of almost 1,800,000 in 1989. Yet for that year it only paid

$2,800.78 for advertising notwithstanding receipt from Mr. Holbrook alone approximately of in excess of $100,000 in that year for general services including advertising. (Tr. at R. 4748-50). See also Plaintiff's Trial Exhibit 15.

16. Mr. Arthur Miller was the sole independent person to review the eleven volumes of accounting records comprising in excess of 4,000 Exhibits and found that seven types of exceptions existed as to how Mr. Holbrook should have been paid under the contracts but was not. (Tr. at R. 4768-4780A, 5258-81, 5585-98). See also Trial Exhibits 22-31 and 32.

17. Mr. Miller testified that there were three specific methods of material overcharges that were used over time to take ever increasing sums of money from Mr. Holbrook's commissions in violation of the contracts and in a manner that had he not terminated his contracts, would have caused him to suffer a pro rata greater loss over time than had previously been forced upon him by Firemaster. He determined this solely by going through these voluminous records. No one from Firemaster ever did this. (Tr. at R. 5266-79). In other words, the more money Mr. Holbrook was making, the more he would have been losing over time based upon Firemaster's actions.

18. Mr. Miller testified that the exceptions to the way that Mr. Holbrook should have been paid were done on a consistent basis, thus indicating an intentional pattern, on the part of Firemaster. (Tr. at R. 5275). See also Plaintiff's Trial Exhibit 32 which is the report of Arthur Miller.

19. Mr. Miller testified to a wrongful method of rounding percentages in every calculation in favor of Firemaster, which although the dollar amount would not be significant regarding

one independent contractor or franchisee such as Mr. Holbrook, over many individuals it would be a substantial sum of money. (Tr. at R. 5593, 5596-97).

20. Alaina Coffman testified that Robin Phillips instructed her not to provide Mr. Holbrook any work unless he signed the commission modification, Plaintiff's Trial Exhibits 8 and 9. (Tr. at R. 5615-16) even though Mr. Holbrook was current in his work. (Plaintiff's Exhibit 10).

21. Ms. Coffman corroborated there was no accounting method of Firemaster to account for commission payments to Mr. Holbrook for second annual inspections (Tr. at R. 5616-17) even though he had been promised such commissions by contract and Firemaster was paid to do accounting for Mr. Holbrook.

22. Alaina Coffman testified she was instructed to never to point out or correct errors <u>against the accounts</u> of the independent contractors and franchisees such as Mr. Holbrook, but only to correct those that were against Firemaster and would therefore result in an advantage to Firemaster. (Tr. at R. 5619-20).

23. Ms. Coffman further testified she was informed it was the job of the independent contractor or franchisee to catch any errors, notwithstanding Firemaster retained the critical accounting documents, and was paid a substantial sum from each invoice to perform bookkeeping and accounting services. (Tr. at R. 5620).

24. Ms. Coffman and Robin Phillips had a conversation after she had determined that there were errors in the manner in which commissions were being paid Mr. Holbrook and others, where she was instructed that Firemaster would not go back to fix past

problems relating to commissions unless caught and brought up by the independent contractor or franchisee. (Tr. at R. 5623).

25. Ms. Coffman was instructed by Robin Phillips that if she gave Mr. Holbrook the higher commission he was entitled to under the agreements, to make up the loss of income to Firemaster by charging him an extra materials charge. (Tr. at R. 5624).

26. Ms. Coffman was informed if she could not identify a part sold on an invoice of Mr. Holbrook's, rather than to clarify the issue with Mr. Holbrook, to charge him the highest price for the part even though Firemaster was paid substantial sums to do Mr. Holbrook's bookkeeping and accounting. (Tr. at R. 5626).

27. Ms. Coffman was told by Mr. Phillips to charge the extra materials charge for parts replaced through the All Risk Insurance Program. In such All Risk Insurance Program, Mr. Holbrook provided parts he had purchased from Firemaster to customers free of charge to the customer as a result of their prior purchase of the All Risk Insurance. Mr. Holbrook was then to be reimbursed the parts at no charge from Firemaster. However, Firemaster then charged Mr. Holbrook the extra materials charge for parts for which he could not charge the customer, thus resulting in a loss to him. (Tr. at R. 5630-32).

28. Mr. Ron Bogardus testified there were benefits to the ownership of the franchise, that by ownership, the customers belong to the franchisee. (Tr. at R. 5375-77). Then, he contradicted himself and stated the contracts make the accounts Firemaster's. Firemaster contended through the entire trial that the customers were Firemaster's confidential customers, in complete contradiction of the alleged benefit on ownership as set forth by Mr. Bogardus.

29. The jury was informed by Mr. Arthur Miller, Mr. Holbrook's accounting expert, that Firemaster had underpaid and overcharged Mr. Holbrook the sum of $37,513.98. See Trial Exhibit 32.

30. Plaintiff testified that he had paid Firemaster $158,206.00 for general services, including bookkeeping and accounting services and advertising. (Trial Exhibits No. 11, 34).

31. It was stipulated and admitted, that Firemaster intentionally and unilaterally altered the terms of the rural Utah franchise contract (Plaintiff's Trial Exhibit 3) regarding commissions earned by Mr. Holbrook in the Brigham City area. (Tr. at R. 5198-99).

32. Tom Kennedy, the corporate representative of Firemaster who negotiated the independent contractor agreement with Mr. Holbrook on behalf of Firemaster, testified he promised Mr. Holbrook certain commissions. (Tr. at R. 5074-94). Later Robin Phillips, the district manager for Firemaster in Salt Lake City sought to unilaterally modify such commissions. (Plaintiff's Trial Exhibits 8 and 9).

33. Mr. Arthur Miller testified that while he could not state there definitely was fraud in the transactions, his failure to so state was only as result of not being able to review all the documents he needed to come to such a conclusion. (Tr. at R. 5272-79).

In its brief, Firemaster failed to marshall any of the above cited evidence to the Court, failed to argue any of the evidence testified to that Mr. Miller found in the 4,000 plus accounting exhibits, (Plaintiff's Trial Exhibits 101-4182), and failed to show how such accounting exhibits do not prove an

taking from the accounts of Mr. Holbrook.

The total failure to marshall the evidence by Firemaster, and address any or all of the issues set forth above, coupled with Mr. Holbrook's evidence of payment to Firemaster of $158,206 for its general services, including advertising, bookkeeping and accounting, of $11,836 in franchise fee purchase payments and the $37,513 testified to by Mr. Miller, clearly shows that there was substantial evidence to support a jury award to Mr. Holbrook of $50,000 on the claim of breach of the implied covenant of good faith and fair dealing in contracts. Utah law is clear that once a claim has been presented to a jury and a verdict has been rendered, all presumptions are in favor of the validity of the verdict and judgment. See Joseph v. W.H. Grow, 348 P.2d 935 (Utah 1960).

Further, under Utah law, after a jury trial, a presumption arises that any judgment resulting therefrom should not be disturbed unless the one attacking it meets the requirements of showing that any error complained of is substantial and prejudicial, so much so that the trial result would have been different is the error was corrected. See Hall v. Blackman, 417 P.2d 664 (Utah 1966); Bowden v. Denver and R.G. W. R.R., 286 P.2d 240 (Utah 1955); Batt v. State, 503 P.2d 855 (Utah 1972).

In the case of Batty v. Mitchell, 575 P.2d 1040 (Utah 1978), the Court held that the amount of the verdict was an exclusive matter for the jury and unless the amount awarded clearly indicates the disregard of competent evidence, or the influence of passion or prejudice, such award must stand. See also Meyer v. Bartholomew, 690 P.2d 558 (Utah 1984).

Firemaster has marshalled no evidence to meet the above referenced standards for setting aside the jury's verdicts. Substantial evidence in fact exists to support the jury's verdict and their appeal is thus doomed. Therefore, the verdict of $50,000 to Mr. Holbrook, as supported by the evidence cited above, must be affirmed.

2. Firemaster's Argument That the Jury's Own Special Verdicts, Granting an Award of $5,891.35 To the Franchisee for the Franchisor's Breach of Contract Claims Set the Outer Limit on the Total Amount of Damages Recoverable on those Claims is Erroneous.

This argument is totally unsupported by law and is erroneous. Not only did Firemaster fail in its' appellant brief to marshall evidence to support this claim, it cannot and did not point to any specific rule of law that supports its' argument. The reason it cannot is because no such rule of law exists.

Clearly, as an independent cause of action, the implied covenant of fair dealing and good faith in contracts carries it's own right of damages. See Rio Algom Corp. v. Jimco LTD, 618 P.2d 497 (Utah 1980). The jury which heard all the evidence has the right to assess the evidence and make a determination as to the correct amount of damages. See Joseph, supra.

Firemaster totally failed in it's burden to marshall the evidence to show the support if any, for the jury award. Firemaster did exactly what appellants do when they are unhappy with well-substantiated jury awards against them. They have attempted to marshall their evidence (see Appellants Brief, pages 34-35), while ignoring the well founded rule as described in the Utah cases cited above of Price-Orem Inv. Co., supra; State v. Larsen, supra; and Zions, supra., which indicate that an

position and the failure to marshall the evidence against their position dooms their appeal.

Where multiple special verdicts are submitted to the jury, the jury was given the right to choose to compensate Mr. Holbrook through his breach of contract claims and in other respects through the multiple breaches of the implied duty of good faith and fair dealing in contracts as supported by the "substantial evidence" requirement set forth above.

The real issue Firemaster should be asking is, was there a double recovery to Mr. Holbrook? This clearly is not permitted. See Brigham City Sand and Gravel v. Machinery Center, Inc., et.al., 613 P.2d 510 (Utah 1980). Mr. Holbrook testified that his damages totaled $207,546.00 under three different types of loss. (Plaintiff's Trial Exhibits 11 and 34). He only received $85,000 in compensatory damages. Therefore no double recovery has occurred.

As stated in the Utah case of Bastian v. King, 661 P.2d 953 (Utah 1983), at page 956:

> "Although an award of damages based only on speculation cannot be upheld, it is generally recognized that some degree of uncertainty in the evidence of damages will not suffice to relieve a defendant from recompensing a wronged Plaintiff. As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of some uncertainty."

A rational basis does exist for the $50,000 award to Mr. Holbrook. The jury clearly believed services Firemaster was paid to perform, either were not in whole, or in part performed. The jury also believed such actions to be in bad faith! In order to right the wrong, the jury awarded Mr. Holbrook damages, but less than one-third of the amount he requested. This award is

substantiated by the evidence and not limited by the existence or alternative forms of relief, so long as no double recovery occurred.

3. The Trial Court Should Not Have Required Mr. Holbrook to Remit the $50,000.00 Damage Award as a Condition to Denying Firemaster's Motion for a New Trial.

A remittitur is only permitted if the jury award is obviously above any reasonable appraisal of the damages suffered. Ruf v. Assoc. for World Travel Exchange, 351 P.2d 623 (Utah 1960)

Mr. Holbrook submitted a memorandum in opposition to this same argument to the Trial Court (R. 4183-89). The Trial Court did not abuse it's discretion in refusing to require the remittitur or grant the new trial. That is the standard this Court must look to on this issue. See Batty, supra. The decision was clearly based upon the Trial Court's independent judgment after hearing all the evidence, declaring an independent termination of Mr. Holbrook's obligations (Tr. at R. 4844-46) and finding that the jury verdicts were fair and the product of a fair trial (Tr. at R. 5821). Firemaster again failed to marshall any evidence to show that the award was excessive or not supported by substantial evidence and this Court's review should clearly be limited to a review of whether Judge Brian abused his discretion. See Batty, supra.

Mr. Holbrook's accounting expert testified to $37,513.98 in actual accounting losses to Mr. Holbrook, which losses would have continued and increased if he did not terminate his contracts. Mr. Holbrook testified to having been charged $158,206 for services that were totally or substantially not rendered and $11,876 for

actions. Mr. Holbrook did not receive a total award of $207,546 but only a total award of $91,807. The jury award was less by half of the damage amount requested by Mr. Holbrook. To claim that to refuse to require such a remittitur was an abuse of discretion regarding award is unsupported by the evidence.

The complexity of multiple claims for relief and having those claims submitted to a jury by multiple special verdicts with the prospect of relief being awarded under alternate theories, should not be cause for error to Mr. Holbrook so long as no double recovery has occurred. See Brigham City Sand and Gravel, supra. It is clear the jury chose to award Mr. Holbrook damages under different theories of relief for the actions of Firemaster during the period of June 1987 to January 1990.

Mr. Holbrook received compensatory damages of $30,032.71, under his claim for conversion plus punitive damages of $5,872.36. He received $5,891.35 for his breach of contract claims. He received $1.00 for his breach of fiduciary duty claim, and $50,000 for his claim of breach of the implied covenant of good faith and fair dealing. These damages could have all been awarded as part of the breach of contract claims and there would be no claim by Firemaster of an excessive or duplicative award. This is especially true where Mr. Holbrook testified to damages of $207,546 (Plaintiff's Trial Exhibits 11 and 34). When the award is split among various claims for relief, but is not duplicative, it is not excessive or even erroneous.

It is interesting to note that Mr. Robert Minor, the jury foreman is an attorney. Another of the jurors was an accountant. If such an educated jury could not avoid awarding duplicate relief

when faced with multiple special verdict forms, it is not likely any jury could.

Only an excessive or duplicative award based upon the jury misapplying the facts or law, or failing to take into account proven facts, or making findings clearly against the weight of the evidence should be cause for a remittitur. See Wellman v. Noble, 366 P.2d 701 (Utah 1961). Where Firemaster failed again to marshall the evidence in support of its position, this Court has no basis to determine if Judge Brian abused his discretion in denying this motion of Firemaster, and therefore its appeal is doomed. See State v. Larsen, supra at 15.

D. FIREMASTER IS NOT THE "PREVAILING PARTY" ON THE PARTIES' BREACH OF CONTRACT CLAIMS FOR PURPOSES OF RECOVERING IT'S ATTORNEY'S FEES.

This Court should answer the threshold legal question in the case by striking the $10,000 award to Firemaster under the Wright, supra and Kinsman, supra precedents, and this issue would be disposed of easily against Firemaster.

As set forth in each contract, Plaintiff's Exhibits 1,2 and 3, Firemaster provided would be reimbursed all its costs and attorneys fees if it was forced to enforce any breaches of the agreements. Both Utah and California law make this obligation mutual. (R. 3195-3350). See Utah Code Annotated 78-27-56.5 which states:

> "A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract or other writing executed after April 29, 1986, when the provision of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees."

See also West's annotated California Civil Code Section 1717, a

herein by this reference.

Based on the contracts and the above referenced statutes, Mr. Holbrook is entitled to his costs and attorneys fees for having to enforce the contracts against Firemaster. Mr. Holbrook honored all his contracts for two and one-half years. Only after he could endure Firemaster's abuses no longer did he cease to honor the contracts. Such honor by Mr. Holbrook should be recognized and rewarded by this Court. Conversely, the lack of honor by Firemaster should be penalized by an award of costs and attorneys' fees to Mr. Holbrook.

However, if the Court were to look at the situation as argued under the case of Mountain States Broadcasting Co., supra, where the party in whose favor the "net" judgment is entered becomes the prevailing party, it is clear that Mr. Holbrook was the "net" prevailing party in this case. His damages were $91,000, all as a result of actions of Firemaster during the existence of the contracts for sales and services of Mr. Holbrook while operating under the contracts. Even if Firemaster retains it's $10,000 judgment, Mr. Holbrook clearly is the "net winner"and should have been awarded his costs and attorneys' fees.

Once this Court addresses the threshold legal question as set forth in the Wright, supra case and vacates the jury's award to Firemaster for $10,000 for breach of the confidentiality provisions of the contracts as a result of its prior intentional, willful and malicious breaches, this issue is resolved. Once the Court vacates such award, it is unquestioned that Mr. Holbrook was the "prevailing party" under Utah and California law and should be entitled to an award of his costs and attorneys' fees. The matter

then should be remanded to the Trial Court to assess the appropriate amount of costs and attorneys' fees payable to Mr. Holbrook based upon the language of the contracts.

E. THE TRIAL COURT DID NOT ERR IN REFUSING TO ENFORCE THE NOTES AGAINST THE FRANCHISEE.

Firemaster should be forced by this Court to answer if it has resold the territories that are the subject of the purchase by the notes. If Firemaster has this is a moot issue. It is also likely moot because Firemaster has the territories back under any circumstance and can or has resold such territories. Firemaster claims Mr. Holbrook received a benefit, i.e., performing under their name, yet Mr. Holbrook testified to $11,826 in franchise fee payments that he was not reimbursed by the jury. (Plaintiff's Trial Exhibits 11 and 34). Now Firemaster claims Mr. Holbrook received a double benefit and should pay the full $110,000.

Firemaster has reacquired its territories. If those territories are sold on a dollar for dollar basis as they were to Mr. Holbrook, they are now worth $200,000 to Firemaster based on Firemaster's thinking. Firemaster has not been damaged by the reacquisition of such territories.

The Trial Court was requested by Firemaster in post-trial motions to enforce these notes against Mr. Holbrook. (R. 3356-84, 3402-27). Firemaster has this fantasy that it can intentionally, willfully and maliciously take commissions from it's independent contractor and franchisee and still have a Court of law or equity require the other party live up to the obligations of the contracts Firemaster intentionally ignored. The boldness with which

Firemaster makes this claim for enforcement of the promissory notes is the very attitude that convinced the jury at trial that Firemaster is a predatory company that should be obligated to pay punitive damages. It is the very attitude that convinced the Trial Court to refuse to grant Firemaster's demand for payment of the notes and why this Court should soundly deny all Firemaster's appeals and affirm all awards against Firemaster so that Firemaster will recognize that it is exactly what the jury found it to be, i.e. a thief.

Firemaster has no right to request payment on notes when the jury found that Mr. Holbrook lived up to all his obligations under the contracts and Firemaster breached all three agreements. (R. 2729-37). These contracts were structured to continue perpetually. (Plaintiff's Trial Exhibits 1,2 and 3). No evidence was presented that Mr. Holbrook had failed to pay the payments on the notes during the existence of the contracts. Firemaster now wants payment for years into the <u>future</u> for the purchase of an asset they wrongfully took back into their possession. Where is their showing of diminished value? There was no evidence to suggest they do not currently possess the value of the notes and therefore they have incurred no loss.

On the other hand, Firemaster does not offer to grant Mr. Holbrook the territories covered by the notes and an exclusive right to fo after all customers in those territories in Firemaster's name in exchange for payment on their notes. Mr. Bogardus indicated the real value of the franchise from Firemaster's point of view was the ownership of the customers. Firemaster has that in its name as much as any other competitor. Mr. Holbrook does not seek to service the customers in the

territories in Firemaster's name. (Tr. at R. 5375-77) Now Firemaster wants payment on the notes and the customers in Firemaster's name as well. Firemaster is so used to having all the benefits and performing poorly or not at all on its obligations from its adhesive contracts, it does not recognize when to stop its predatory behavior.

Firemaster's own intentional breaches of all three agreements serve to estop Firemaster from either demanding or collecting payment under the notes. The jury found that to be the case in its special verdicts.(R. 2729-37, 2759-60). In Mr. Holbrook's separate post-trial request for declaratory relief, Judge Brian independently came to the same conclusion. (Tr. at R. 4844-46).

Notwithstanding the jury's and Trial Court's separate, yet identical conclusions, after hearing the evidence, that Firemaster was not entitled to payment on the notes, Firemaster continues to insist that it should somehow receive payment for notes it would have received had it not breached the contracts. If Firemaster had been paid in cash for the territories rather than by notes, under the circumstances as found by the Court and jury in this case, Mr. Holbrook would be entitled to a complete reimbursement for such fees. What Firemaster was selling in exchange for the notes, was not customers, but a territory in its name. See Plaintiff's (Trial Exhibits 2 and 3 page 5, R. 80-81, 135-136. It can sell the territories again to recover any loss. Firemaster is simply not entitled to receive payment on the notes given the circumstances of this case based upon Firemaster's own actions.

PREJUDICIALLY ALLOW THE FRANCHISEE TO URGE THE JURORS TO PLACE THEMSELVES IN THE FRANCHISEE'S SHOES TO DETERMINE WHETHER THE FRANCHISEE SHOULD BE REQUIRED TO HONOR HIS CONTRACTS.

Of all the cases cited by Firemaster to support its' argument on this issue, none are Utah cases. No Utah law exists on point on this issue from the research of both sides.

In each of the cases cited by Firemaster, the alleged attempt of counsel to inflame the passion and prejudice of the jurors by placing themselves in the injured party's shoes was not found to be reversible error even though it was stated that such action could be found to be reversible error.

In fact, the specific argument that was objected to by Firemaster went to the issue of whether or not there was duress imposed upon Mr. Holbrook to force him to enter into the contracts. (Tr. at R. 5477-8). In the special verdict on that issue (R. 2759, Question 1) the jury answered No, when asked if Mr. Holbrook was required to enter into the two franchise purchase contracts under duress. Therefore, notwithstanding any alleged violation of the "golden rule", the jury was not influenced to find for Mr. Holbrook on the specific point which would have been influenced by the conduct complained of by Firemaster. This is but another example of Firemaster alleging error frivolously.

Firemaster failed to marshall the evidence to show that the jury results could only be based on passion and prejudice. Therefore, their appeal fails as a matter of law. Price-Orem Dev. Inc., supra. and State v. Larsen, supra. The fact that Firemaster prevailed on the very issue complained of shows the predatory nature of Firemaster in this case and its actions to bankrupt Mr. Holbrook with frivolous but expensive legal action. It should show

this Court that if any party has engaged in unfair bargaining tactics, it is Firemaster.

G. THE TRIAL COURT DID NOT IMPROPERLY REFUSE TO MAKE PERMANENT THE PRELIMINARY INJUNCTION.

For the reasons set forth above and pursuant to the Wright, supra and Kinsman, supra cases the Trial Court did not err in failing to make the preliminary injunction permanent. In fact, the preliminary injunction was clearly a wrongfully entered injunction given the jury findings that Mr. Holbrook had fulfilled his obligations under the contracts between June of 1987 and July of 1990 and that Firemaster breached all three agreements. No other explanation can exist in the case! (R. 2729-37).

Regarding the Court's decision to require an "equitable" payment for access to the confidential customer list, Mr. Holbrook argued that Firemaster was not entitled by its' actions to any form of equitable relief. Such arguments were set forth in Mr. Holbrook's memorandum below. (R. 3510-18). The arguments set forth therein are incorporated by this reference. Mr. Holbrook set forth below that Firemaster's actions prohibited any Court from extending to it equitable relief. See Battistone v. American Land and Dev. Co., 607 P.2d 837 (Utah 1980) and Bradford v. Alvey and Sons, 621 P.2d 1240 (Utah 1980). This same reasoning applies to this appellate issue raised by Firemaster.

If Firemaster is entitled to a permanent injunction given the facts of this case, Mr. Holbrook respectfully requests this Court to explain in detail the legal reasoning of how a party that is found to have tortiously converted the funds of another, having breached the contracts that provide the basis for injunctive

breached its fiduciary duties to that party, having breached the implied covenant of good faith and fair dealing regarding the contracts to the other contracting party and having been found liable for punitive damages for its willful and intentional acts can come before a Court of equity in the State of Utah with "clean hands," and therefore be entitled to equitable relief.

Firemaster is not entitled to a continuation of the injunction and in fact Mr. Holbrook should have been entitled to put on evidence, as he requested and as set forth below, of his damages as a result of the wrongful imposition of the injunction and should be permitted to have that amount determined and awarded to him.

VIII.

CROSS-APPEAL ARGUMENTS

A. THE TRIAL COURT ERRED IN REFUSING TO GRANT MR. HOLBROOK'S MOTION FOR PARTIAL SUMMARY JUDGMENT REQUESTING FIREMASTER TO BE REQUIRED TO PERFORM AND PAY FOR A FAIR AND IMPARTIAL ACCOUNTING UNDER THE CONTRACTS.

Since this issue was decided by the Trial Court by way of motion for summary judgment, it is a question of law that is reviewed for correctness. The reviewing Court need not ascribe any weight to the findings of the Trial Court. See Jones v. Bountiful City, 187 Utah Adv. Rep. 23 (Utah Ct. App. 1992).

Pursuant to Sections 8(c), 8(d) and 8(e) of each of the contracts, Plaintiff's Trial Exhibits 1, 2, and 3 entered into between the parties, all of the proceeds of all sales and service

performed under the contracts were specifically assigned to Firemaster. The customers were to remit payment directly to the Firemaster offices. This language can be reviewed on each invoice in the accounting Trial Exhibits 101-4182. (See an example at Plaintiff's Exhibit 114.) The specific language on the invoice used by Firemaster is:

> "Seller hereby assigns this Account Receivable to Master Protection Including All Taxes"

Firemaster was then responsible by contract to receive the money, perform accounting and bookkeeping services relating to the account, pursuant to contract as set forth therein, regarding the funds so received and disburse the appropriate and correct sums to Mr. Holbrook. Firemaster received in excess of $158,000 for these services. Firemaster kept the critical invoices as confidential documents and would not permit Mr. Holbrook to have them. H therefore e could not even perform his own accounting. (Tr. at R. 4401-12, 4595, 4693-95, 4700-1, 4701-3).

In the event that Mr. Holbrook received cash, he was to turn that cash immediately over to Firemaster so that it could be accounted for in the same process as payments mailed to the Firemaster office. (See section 4-8 of Plaintiff's Trial Exhibits 1, 2 and 3.)

As a result of the Firemaster procedure set forth by the contracts, as drafted by Firemaster, Firemaster was in complete control of the proceeds of all sales and service, in control of all critical documentation, and in control of all bookkeeping and accounting pertaining to receipt of income and the distribution of such income between the parties.

As set forth in the Motion for Partial Summary Judgment

Mr. Holbrook requested of the Court that Firemaster be required to perform and pay for a fair and impartial accounting. Firemaster's only response was to argue its interpretation of its responsibilities under the contracts (R. 1409-13). The clear rule of contract interpretation is to attempt to construe a contract in conformance with the intent of the parties, and if that fails to construe the contract against the drafter. See Atlas Corp v. Clovis National Bank 737 P.2d 225 (Utah 1987); Sears v. Reimersma, 655 P.2d 1105 (Utah 1982); and Parks Enterprises, Inc. v. New Century Realty, Inc. 652 P.2d 918 (Utah 1982).

The Trial Court refused to grant Mr. Holbrook's Motion for an accounting and Mr. Holbrook was required to hire his own accounting expert to perform an independent accounting of the monetary affairs between the parties, for which the Trial Court unbelievably has not required Firemaster to pay.

When the accuracy of the bookkeeping and accounting services of Firemaster was called into question, and when Firemaster was the party that had actual physical control of the funds, of all financial paperwork concerning invoicing for, receipt of, and distribution of income and was specifically paid for such services by contract, there is no material question of fact but that Firemaster should have been responsible to perform and pay for a fair and impartial accounting of the affairs between the parties. To not order such, was clear reversible error by the Trial Court.

Now that Mr. Holbrook has paid for such accounting, the practical solution is to find that Firemaster is liable for all costs relating to Mr. Holbrook's independent accounting in this

matter.

B. THE TRIAL COURT ERRED IN GRANTING FIREMASTER'S MOTION TO DISMISS MR. HOLBROOK'S STATE AND FEDERAL RACKETEERING CLAIMS.

Firemaster filed repeated Rule 12(b)(6) motions to dismiss the Utah State and Federal Racketeering claims brought by Mr. Holbrook. The Trial Court eventually dismissed those racketeering claims based upon its finding that the contracts between the parties stated that California law applied (R. 1671-74, 1675-76. See also Tr. at R. 5174-91).

The standard for review this Court must look at is one of reviewing the decision for correctness, since the decision was one of the Trial Court on a motion to dismiss and the reviewing Court should not ascribe any particular weight to the findings of the Trial Court. See Jones, supra.

The Trial Court provided Mr. Holbrook several opportunities to amend his complaint, which opportunities he utilized. (R. 667-701, 1298-1399). It is the position of Mr. Holbrook that he fully and completely stated a sufficient claim for purposes of avoiding a motion to dismiss by Firemaster under both the Utah State racketeering statute and the Federal racketeering statute. (R. 1332-65).

The basis of the Trial Court's decision was that California law applied and that since no claim for relief under a California racketeering statute was pled, the Utah and Federal claims should be dismissed. Racketeering claims are basically tort claims. They are not contract claims. Under the law of tort claims

there are well established rules relating to the law of which forum applies.

A "tort" under Utah law is a legal wrong committed by one against the person or property of another and is a violation of duty imposed by law. Kimiko Toma v. Utah Power & Light Co. 365 P.2d 788 (Utah 1959).

Utah law was not found on the issue of whether Utah follows the general rule regarding choice of law provisions relating to "torts". Other states are clear on this issue.

In the Washington case of Haberman v. Washington Public Power Supply System, 744 P.2d 1032 (Wash. 1987), the Court there held that the choice of law in a contract does not govern tort actions arising out of contracts. The choice of law in the contract may be considered as one of the elements in the most significant relationship test used in tort cases.

This most significant relationship concept is the general rule which mandates that the first step in choice of law cases is to have the Court evaluate the contacts with each interested jurisdiction according to their relative importance to the issue. The underlying facts of the case is the most important issue. See Southwell v. Widing Transp., Inc., 676 P.2d 477 (Wash. 1984).

Under each of the significant contracts and underlying facts in this case, a Utah Court should clearly find that Utah law applied. The contracts between the parties were executed in Salt Lake City. The operation of the independent contractor and franchise areas occurred primarily in the State of Utah. The majority of the witnesses were in the State of Utah. All of the accounting records were in the State of Utah. The damage to Mr. Holbrook occurred in the State of Utah. All funds were handled in

Utah. The law of Utah should apply to the racketeering claims of Mr. Holbrook rather that the law of the State of California.

However, as argued to Judge Brian prior to his ruling dismissing the racketeering claims, California law would reach the same conclusion. In the case of Doyle v. the United States, 530 F.Supp. 1278 (Cent. Dist. of Calif. 1982) a California Court found the same criteria to be applicable as set forth above for determining which law to apply to tort claims. In the Doyle, supra case, the California Court found that Louisiana law applied based upon the application of the same criteria regarding the significant relationships to the case. If those same criteria are applied in the extant case, even under California law, the racketeering law of the State of Utah would be applied rather than that of California.

The existence of a Federal racketeering claim being dismissed on the basis that California Law applied makes absolutely no sense under any applicable rule of law. In fact, the jurisdictional requirements of the Federal racketeering statute mandate that elements of the action must have occurred across state boundaries in order to qualify as a Federal racketeering cause of action. (R. 1356-65). Such cause of action therefore pre-supposes that multiple states will be involved and Federal law will apply.

To permit the language of a contract to be the sole grounds to dictate the choice of law relating to tortious or racketeering actions between those parties is very simply reversible error.

Mr. Holbrook therefore respectfully requests this Court to vacate the order dismissing Plaintiff's Utah and Federal racketeering causes of action and to vacate the award to Firemaster

of attorneys' fees associated with the dismissal of the Utah cause of action. (R. 3883, Paragraph 3). Mr. Holbrook further respectfully requests that the State and Federal racketeering claims be remanded to the Trial Court for further proceedings on the grounds that such claims have been pled sufficiently to defeat a motion to dismiss.

C. THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE PLAINTIFF TO PUT ON EVIDENCE AT TRIAL OF LOST PROFITS INCURRED AS A RESULT OF THE WRONGFUL IMPOSITION OF THE PRELIMINARY INJUNCTION AND/OR ALTERNATIVELY TO PERMIT SUCH A DETERMINATION AS PART OF MR. HOLBROOK'S POST-TRIAL MOTION FOR DECLARATORY RELIEF.

Both of the decisions appealed from here were decisions of the Court which therefore are viewed under the "correctness" standard set forth in the Jones, supra case.

The Court made its ruling to refuse Mr. Holbrook the right to put on evidence of lost profits based upon a motion in limine of Firemaster filed on the Friday before the Monday trial beginning. (R. 3034-45, 2887-3033). Mr. Holbrook's counsel, pointed out to the Court that at page 139 of his Second Amended Complaint (Tr. at R. 4481-85), he specifically requested damages for the wrongful imposition of the injunction. It is true that Mr. Holbrook did not say the two words that the Court and Firemaster believe to be "magic", those two words being lost profits. He did specifically request damages for the wrongful imposition of the injunction.

It is true that Rule 9(a), Utah Rules of Civil Procedure, requires that a claim for lost profits must be alleged with specificity. However, Firemaster is clearly on notice of the plain language of the complaint. The controlling case on this issue is

the Utah case of Cohen v. J.C. Penney Co., 537 P.2d 306, (Utah 1975) where the Court indicated that a failure to state the words "lost profits" is not death to the ability of a Plaintiff to introduce such evidence, if the lost profits automatically flow from the injury complained of.

In this case it is obvious that if Firemaster requested an injunction restraining Mr. Holbrook from performing services pursuant to that injunction and was required to post a $75,000 bond as they did, the fact that Mr. Holbrook would lose income from the failure to work would automatically follow. If the injunction was not wrongful, no damage exists to Mr. Holbrook. If the preliminary injunction was wrongful, Mr. Holbrook should be entitled to put on damages of the clearly consequential lost profits.

The only purpose for Firemaster to post a $75,000.00 injunction bond, was to guarantee such damages, if the injunction was wrongful. For Firemaster to thereafter argue it had no knowledge or notice that Mr. Holbrook would seek damages for lost profits as a result of such injunction is ludicrous. It is only too obvious that a party has notice of its own actions and consequently the ability to prepare regarding defending those actions. The Court clearly erred in refusing to permit evidence of the lost profits at trial or deciding the issue correctly thereafter.

Mr. Holbrook brought the matter to the Trial Court's attention by way of his motion for declaratory relief after trial (R. 3194-95, 3196-3194, 3195-3350, 3351-53). The Court refused to grant damages to Mr. Holbrook as a result his request for declaratory relief for what apparently was the Court's finding that the injunction was not wrongfully entered. (Tr. at R. 4808-13,

4825, 4844-46). The jury verdicts finding that Firemaster breached all three of the contracts of the parties causes a tremendous conflict with the concept found by the Trial Court that the injunction was not wrongfully entered and is unexplained by the Trial Court either by findings of fact or law.

The sole basis for the injunction in the first instance was Firemaster's alleged contractual right to have such an injunction, assuming that Firemaster had not breached the contracts and that Mr. Holbrook had further obligations under the contracts after January of 1990. The injunction was entered in March of 1990. The clear independent findings of the jury and Trial Court were that Firemaster had breached all three of the agreements, that Mr. Holbrook had no further obligations under the contracts and there is no other explanation that follows except that the injunction was wrongfully entered. The Court does not have authority to reform the parties agreements. Cunningham, supra.

In order to have any consistency and logic in the application of contractual rules and obligations, this Court must find that the breach of all three agreements and termination of Mr.Holbrook's obligations under those contracts mandates that the injunction was wrongfully entered and appropriate damages therefore must flow to the Plaintiff.

Mr. Holbrook and all parties who have had their contracts breached by the other party, are entitled to a similar clear statement as set forth in the Kinsman and Wright, supra cases of this Court that a breaching party is by law not entitled to require performance of the nonbreaching party to the contracts. Without such a finding by this Court, all parties to contracts in the State of Utah will be totally at a loss as to how they should perform

once the other side to the contract has indicated their disdain for the written agreement by breaching such agreement.

Mr. Holbrook submitted in his motion for directed verdict a request for $75,000.00 of damages for the wrongful imposition of the injunction. The Court had sufficient evidence before it to find that $75,000.00 would be an appropriate award of damages. (R. at 3146-94, 3195-3350). The Trial Court set that number as the bond amount based upon the representation by Firemaster that the $75,000 figure was approximately the amount of profit Mr. Holbrook had earned in his last full year with Firemaster while operating the independent contractor and franchise areas. (Tr. at R. 5139). The Trial Court should have awarded the entire $75,000.00 to Mr. Holbrook as a result of the wrongful imposition of the injunction and had substantial evidence to permit it to do so.

This $75,000 figure was the amount the Court stated off the record it would order as a bond. Mr. Holbrook has asked for at least $500,000. Firemaster suggested the $75,000 figure based upon the amount it represented was Mr. Holbrook's net income for 1989.

Mr. Holbrook therefore respectfully requests this Court to find as error the Trial Court's refusal to permit him to put on evidence of damage at trial as a result of the wrongful imposition of the injunction, to ascribe as error the decision of the Trial Court regarding the Plaintiff's motion for declaratory relief not to permit him to put on further evidence of damage and/or to find that the Plaintiff was damaged in the amount of $75,000.00 for the wrongful imposition of the injunction.

D. THE AWARD TO MR. HOLBROOK OF ONLY $5,872.36 IN PUNITIVE DAMAGES WAS REVERSIBLE ERROR WHERE THE DISTRICT COURT REFUSED TO PERMIT EVIDENCE OF FIREMASTER'S NET WORTH TO GO TO THE JURY.

Mr. Holbrook sought to admit the financial statement of Firemaster into evidence towards the close of his case. (Tr. at R. 5442). Firemaster's counsel objected to the introduction of this evidence and the Court sustained this objection indicating that if it was going to be introduced, it would be after some later ruling by the Court.

The special verdict relating to conversion by Firemaster requesting punitive damages was permitted by the parties and the Court to go to the jury and the jury returned an award of punitive damages without having reviewed any financial information concerning Firemaster. (R. 2743-45).

The cases of this Court are clear that it essential for the trier of fact to know the financial condition of a party against whom punitive damages are to be assessed for a correct determination of the amount of punitive damages. See Crookston v. Fire Insurance Exchange, 164 Utah Adv. Rep. 3 (Utah 1991).

In post-trial motions, Firemaster interestingly raised this issue and it came for hearing before the Trial Court. In that hearing, (Tr. at R. 5795-5803), the Court indicated that it believed that the matter was not handled correctly. The Trial Court indicated that the Court, Plaintiff's Counsel and Defense Counsel all had a hand in causing the problem to not be handled correctly and that the matter should be resolved by way of a new trial on the correct amount of punitive damages. When the Court made such statements, counsel for Firemaster withdrew the motion.

It is clear that the amount of punitive damages was not

correctly assessed pursuant to the criteria set forth under Utah law. See Crookston, supra. Since the issue was submitted incorrectly, the issue should be remanded for a new jury or a Court's determination of the correct amount of punitive damages. This is the procedure mandated under the Utah case of Bundy v. Century Equipment Co., 692 P.2d 754 (Utah 1984).

E. THE TRIAL COURT ERRED IN NOT GRANTING MR. HOLBROOK'S MOTION FOR DIRECTED VERDICT, JUDGMENT NOV, AND/OR MOTION FOR DECLARATORY RELIEF, STRIKING THE JURY VERDICT TO FIREMASTER FOR BREACH OF THE CONFIDENTIALITY PROVISIONS OF THE CONTRACT.

The Trial Court erred in refusing to grant the Plaintiff's Motion for a Directed Verdict, for Judgment Notwithstanding the Verdict and Declaratory Relief. Mr. Holbrook proved that Firemaster breached all the agreements during the applicable time periods of June 1987 through January 1990, and that all breaches alleged against Mr. Holbrook occurred after he terminated his relationship with Firemaster, and after enduring two and one-half years of accounting abuses by Firemaster. Firemaster did not even put on any evidence that Mr. Holbrook had failed in any of his obligations under the contracts (Tr. at R. 5244-45)

This is a mixed question of law and fact. The factual composition of the Directed Verdict Motion, Judgment NOV, and Declaratory Relief claims are reviewable under a clearly erroneous standard. See the case of Matter of Estate of Bartell, 776 P.2d 885 (Utah 1989). The legal propriety of the district Court's decision on this issue and the resulting legal effects are reviewable under correction of errors standard. Jones, supra.

The cases decided by this Court of Wright and Kinsman, supra clearly establish that once a contract is breached by one

obligations under the contract.

The only way to bring sanity and consistency to contractual relations, when breaches occur, is to conform to the rules set forth by this Court in the Wright and Kinsman, supra cases set forth above.

Based upon Utah law and the facts as clearly found by the jury, and recognized independently by the Trial Court in this case, this Court as a matter of law must strike any awards to Firemaster flowing from obligations Mr. Holbrook would have had under the contracts but for Firemaster's breaches of the contracts between June of 1987 and January of 1990. This means that the Court must strike the jury verdict award of $10,000 to Firemaster, must sustain the Trial Court's decision not to impose liability on the notes, must find that Mr. Holbrook was therefore the "prevailing party" in the action for purposes of assessing attorneys' fees and costs, must find that Mr. Holbrook receive damages for the wrongful injunction, and must reverse the decision of the Trial Court charging Mr. Holbrook $11,014.00 in cash as an "equitable" payment in order for him to have access to the confidential customer list.

F. THE DISTRICT COURT ERRED IN REFUSING TO AWARD MR. HOLBROOK HIS COSTS AND ATTORNEY'S FEES AS THE PREVAILING PARTY IN THIS ACTION AND UNDER THE STANDARDS OF UTAH CODE ANNOTATED SECTION 78-27-56.

The standard for review in this matter is that for a mixed question of law and fact. The factual composition of the district Court's ruling is reviewable under a clearly erroneous standard. Matter of Estate of Bartell, supra. The legal issues of awarding attorney's fees and costs is reviewable under a

correction of error standard. Jones, supra.

Once the Court makes the decision to terminate any further obligations of Mr. Holbrook after the breaches of Firemaster ending in January 1990, when Mr. Holbrook terminated with Firemaster, the refusal to grant Firemaster any further relief under the contracts dictates that Mr. Holbrook was the "prevailing party" of this action. Wright , supra. The contracts dictate this resUlt.

As set forth in each contract, Plaintiff's Exhibits 1, 2 and 3, Firemaster wrote in it would be reimbursed all its costs and attorneys fees if it was forced to enforce any breaches of the agreements. Both Utah and California law make this obligation mutual. (R. 3195-3350). See Utah Code Annotated 78-27-56.5 cited above. See also West's Annotated California Civil Code Section 1717, Attachment A hereto.

Based on the contracts and the above referenced statutes, Mr. Holbrook is entitled to his costs and attorneys fees for having to enforce the contracts against Firemaster. Mr. Holbrook honored all his contracts for two and one-half years. Only after he could endure Firemaster's abuses no longer did he cease to honor the contracts. Such honor by Mr. Holbrook should be recognized and rewarded by this Court. Conversely, the lack of honor by Firemaster should be penalized by an award of costs and attorneys' fees to Mr. Holbrook.

This decision is also true for purposes of assessing costs and attorney's fees under the Mountain States Broadcasting v. Neale, supra case which sets forth the "net" winner standard.

Not only was Mr. Holbrook the "net" winner as described in the Mountain States, supra case but under the standard set forth

in Utah Code Annotated Section 78-27-56, the Trial Court abused its discretion in failing to award attorneys' fees to Mr. Holbrook where Firemaster was found to have tortiously converted his funds to have breached its fiduciary duty to Mr. Holbrook, to have breached the implied covenant of good faith and fair dealing to Mr. Holbrook and punitive damages were awarded against Firemaster. Code Section States in pertincut as follows:

> (1) "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court dtermines that the action or defense to the action was without merit andnot brought or asserted in good faith..."

If a Plaintiff can convince a jury of all of the relief awarded to Mr. Holbrook in this action for the opposing party's tortious and bad faith conduct, including an award of punitive damages, he clearly has met the standard of Utah Code Annotated 78-27-56 sufficient to permit the Court to award attorneys' fees and costs. If that statute has any meaning in the law of Utah, it was clear error not to apply it in this instance as requested by Mr. Holbrook and the failure to do so was a clear abuse of the Court's discretion.

Additionally, the Court should consider the logistics problem facing Mr. Holbrook in bringing this action. He had to pay an attorney. He had to hire an accountant to dig through thousands of documents (Trial Exhibits 101-4182) that he had already paid Firemaster $158,000 to track and account for.

Firemaster is a large, multi-million dollar nationwide company. Mr. Holbrook is an individual Utah resident who earned a decent living but is not wealthy. For an individual such as Mr.

Holbrook to take on a nationwide company is an incredible effort. To prevail as Mr. Holbrook did and to show the bad faith and predatory action of Firemaster as it did clearly shows an entitlement to costs and attorneys' fees.

Through no other process, except the award of costs, attorneys fees and punitive damages, can predatory companies such as Firemaster be stopped from doing to their contracting parties such as Mr. Holbrook what a jury unanimously found they did to Mr. Holbrook.

Mr. Holbrook respectfully requests this Court to order that which Mr. Holbrook was entitled to his costs and attorneys' fees and to remand the issue of the amount to the Trial Court.

G. THE DISTRICT COURT ERRED IN REQUIRING MR. HOLBROOK TO PAY $11,014.00 IN CASH AS AN "EQUITABLE" PAYMENT TO FIREMASTER FOR ACCESS TO THE CONFIDENTIAL CUSTOMER LIST WHERE MR. HOLBROOK WAS FOUND TO HAVE FULLY PERFORMED HIS OBLIGATIONS UNDER THE CONTRACTS

This issue presents a mixed question of law and fact. As set forth above, the factual composition of the issue is reviewable under a clearly erroneous standard. See matter of Estate of Bartell, supra. The propriety of the application of equity sua sponte by the Trial Court to award Firemaster an "equitable" sum is reviewable under a correction of error standard. Jones, supra.

The Trial Court saw and heard the evidence at trial, and made a decision declaring that Mr. Holbrook had no further obligations under his contracts except this "equitable payment" (Tr. at R. 4808-13, 4844-46). The Trial Court clearly was

entitled to any further relief under the contracts between the parties.(Tr. at R. 4844-46). Neither party requested equitable relief as imposed by the Court. The Court came up with the solution on its own.

While the parties argued the Court's suggestion, Mr. Holbrook consistently maintained that Firemaster, because of its tortious conduct as found by the jury was not entitled to relief from a Court of equity. (R.3712-17). See Battistone v. American Land and Dev. Co., 607 P.2d 837 (Utah 1980); Bradford v. Alvey and Sons, 621 P.2d 1240 (Utah 1980). The case of Cunningham, supra at Page 553 indicates that the Trial Court should not revise the parties agreement by the use of equity. These parties before the Court have detailed contracts which should dictate their relationships as decided by the law of contracts.

The Trial Court made no findings to identify any legal standard it relied upon to justify awarding equitable relief to Firemaster. (R. 3728-29). As such, it is difficult to specifically criticize the decision of the Trial Court. It is clear from the cases cited by Mr. Holbrook in his argument before the Trial Court that one coming into equity must do equity, must have clean hands or they would be barred from obtaining equitable relief. See Battistone, supra and Bradford, supra. Although Firemaster did not request the relief the Court awarded, it was the beneficiary of such relief.

A party found to have breached contracts repeatedly, in hundreds of instances over a two and one-half year period, in a manner justifying the imposition of punitive damages precludes such party from requesting or receiving equitable relief from a Court,

or as in this case, from a Court Sua Sponte, without clear findings of fact or citation to law to support such a decision.

The decision of the Trial Court to award Firemaster equitable relief was clearly erroneous and a clear abuse of its discretion. Therefore, such award to Firemaster should be vacated by this Court.

IX.

CONCLUSION

This matter was tried to a jury for six days. Mr. Holbrook was required to pay an accountant to do over that which he had paid Firemaster over $158,000.00 to perform, i.e. bookkeeping and accounting services relating to the accounts serviced during the parties relationship. In that performance, Mr. Holbrook proved to the satisfaction of the jury that he had been damaged in the amount of $91,807. by the various breaches of contract and tortious activity of Firemaster. The amount awarded was less than one-half of the damage amounts testified to by Mr. Holbrook and his expert.

All of the damage done by Firemaster to Mr. Holbrook occurred during the time period of June of 1987 and January of 1990.

The only claims Firemaster has against Mr. Holbrook are based upon actions of Mr. Holbrook from going into competition with Firemaster after January of 1990, after he had terminated his relationship with Firemaster because of Firemaster's prior repeated, egregious actions.

Firemaster's appellate issues are all meritless because

and because of its waiver of the alleged errors by its own stipulations at trial.

Firemaster failed to marshall any evidence to convince this Court of the correctness or soundness of its arguments, but instead chose solely to marshall certain evidence in its favor, a clear deviation from proper appellate procedure that should doom its appeals.

A jury found unanimously for the Plaintiff on the wrongs set forth in the special verdicts. Independent of the jury, the Trial Court similarly found that Mr. Holbrook had no further obligations under the contracts with the exception of the $11,014.00 award, which was not an award under the contracts but a sua sponte award by the Trial Court.

The 4,000 plus accounting exhibits which are the core of the wrongs in this case were completely reviewed only by Mr. Holbrook and Mr. Miller, his accountant. The problems pertaining to such exhibits as testified to at trial, and the intentional abuses of Mr. Holbrook's rights as testified to and recognized by the jury clearly provided substantial evidence for the jury's verdict. No one from Firemaster ever testified to show that the problems identified by Mr. Holbrook and Mr. Miller were incorrect. To go against the weight of what was testified about concerning those Exhibits is what a Court must do to set aside the jury's awards. The jury did not. Independent of the jury, Judge Brian did not.

This Court has already decided thoughtful and appropriate precedent with its findings in the Wright, and Kinsman, supra cases. Mr. Holbrook was and should be lawfully excused from any

further performance under the contracts as a result of Firemaster's breaches. Mr. Holbrook should be totally excused from any and all performance including the striking of the Firemaster award of $10,000 for alleged breaches of the confidentiality provisions of the contracts, as a result of Firemaster's prior repeated breaches over two and one-half years. Mr. Holbrook honored his contracts. Firemaster did not. Such honor should be rewarded.

The result of the threshold legal decision being made to strike the $10,000 award to Firemaster entitles Mr. Holbrook to his costs, attorneys' fees, a finding that the injunction in the case was wrongful, an award of damages to him from such wrongful injunction and a striking of the $11,014 "equitable" award. Additionally, the erroneous legal decisions of the Trial Court as argued in this brief relating to punitive damages, to dismissing Mr. Holbrook's Utah State and Federal Racketeering claims and the Court's refusal to permit Mr. Holbrook to put on evidence of his lost profits as a result of the injunction were prejudicial errors which should be resolved by a reversal of the decisions and a remand of those matters for further proceedings before the Trial Court.

DATED this 14th day of September, 1992.

Richard N. Bigelow

RICHARD N. BIGELOW
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on 20th day of October, 1992 a true and correct copy of the foregoing Brief of Appellee and Brief of Cross-Appellant was hand-delivered or mailed, postage prepaid to:

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Richard N. Bigel

ATTACHMENT A

the action. The court may allow the filing of a pleading claiming liability based upon a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.

(Added by Stats.1988, c. 1052, § 1.)

Historical and Statutory Notes

1988 Legislation

Section 2 of Stats.1988, c. 1052, provides:

"It is the intent of the Legislature in enacting this measure to modify the decision of the Court of Appeal in Wolfrich Corp. v. United Services Automobile Assn., 149 Cal.App.3d 1206 (1st Dist.1983)."

§ 1717. Action on contract; award of attorney's fees and costs; prevailing party; deposit of amounts in insured, interest-bearing account; damages not based on contract

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce * * * that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs * * *

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, * * * and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated.

(c) In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

(Amended by Stats.1986, c. 877, § 1; Stats.1986, c. 785, § 1; Stats.1987, c. 1080, § 1.)

Historical and Statutory Notes

1986 Legislation

The 1986 amendment by c. 785 added the last paragraph which provided that the court should order deposit of the amount tendered in an interest bearing account upon application of any party.